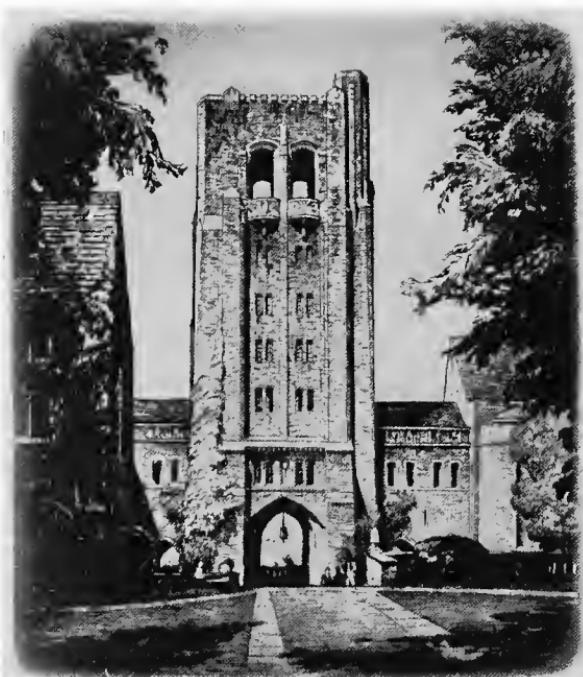


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THE LAW
OF
CHATTEL MORTGAGES
AND
CONDITIONAL SALES

Adapted to New York State

THIRD EDITION

By

AUSTIN B. GRIFFIN
of the Albany Bar

and

ARTHUR F. CURTIS
of the Delhi Bar



ALBANY, N. Y.
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1918

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PREFACE

The necessity for a book upon the New York State law of chattel mortgages and conditional sales is so urgent that the authors feel that an apology for its production is not required. Since the publication in 1900 of the third edition of Mr. Smith's work, no attempt has been made to present in text-book form the law of such contracts. During the past twelve years, the hundreds of new cases upon the law of chattel mortgages, together with the many changes in the statute have rendered older books practically valueless. But while a great change has been taking place in the law of chattel mortgages, a revolution in the law of conditional sales has occurred.

Chattel mortgages and contracts of conditional sale are more frequently entered into than any other written contracts. Although they are so common, no other branch of the law affords so many complications; no other legal subject is so honeycombed with pitfalls for the unwary. An almost endless variety of involved questions arises.

The decisions of New York State present such a wealth of material upon the law of chattel mortgages and conditional sales that, as a general proposition, the decisions of other jurisdictions have not been consulted. However, it has been thought wise to include the Federal decisions which construe the New York statutes. In the chapters on Mortgages of Vessels and Mortgages in Bankruptcy, cases of other States and of Federal courts have been inserted. All the New York State decisions which an extensive search disclosed have been included to 205 N. Y. 485, 149 App. Div. 640, 76 Misc. 192, 135 N. Y. Supp. 688.

ALBANY, N. Y., *August 15, 1912.*

AUSTIN B. GRIFFIN.

ARTHUR F. CURTIS.

PREFACE TO THIRD EDITION

The rules of law pertaining to Chattel Mortgages and Conditional Sales are, in some respects, so complicated, and the Bench and Bar are so frequently called upon to pass opinion on these branches of the law, that a text-book discussing the subjects should contain the latest citations of authority. The wisdom of keeping the book up to date, together with the necessities arising from the sale of the entire first and second editions, have caused the preparation of a new edition. The authors trust that it will receive the same consideration from the Profession as has been accorded to the earlier editions.

Changes in the statutory provisions have been inserted, and reference is made to the new decisions including 224 N. Y. 232, 183 App. Div. 176, 103 Misc. 718, 171 N. Y. Supp. 368.

Albany, N. Y., Sept. 10. 1918.

**AUSTIN B. GRIFFIN,
ARTHUR F. CURTIS.**

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PART I

CHATTEL MORTGAGES

CHAPTER I.

NATURE OF CONTRACT.

- Sec. 1. Derivation of Term "Mortgage."
- 2. Definitions.
- 3. Different from Real Estate Mortgage.
- 4. Incidental to Debt.
- 5. Title of Parties.
 - a. Before Default.
 - b. After Default.

Sec. 1. Derivation of Term "Mortgage."

The term "mortgage" is derived from two French words; *mort* meaning *dead*, and *gage* meaning *pledging*.¹ The term *mortuum vadium* was also used in early times to designate the transaction now commonly called a mortgage. These terms were used for two reasons. *First*: To distinguish the transaction from the *vivum vadium*, or living pledge; where a debtor, who borrowed money, transferred an estate to his creditor, to be held by the latter until he had repaid himself out of the issues and profits of the estate. In such a case, the estate was never lost or *dead* to the debtor.² The second reason is thus stated by Littleton:—"It seemeth that the reason why it is called mortgage is, that it is doubtful whether the feoffer will pay, at the day limited, such sum or not; and if he doth not pay, then the land, which is put in pledge upon condition, for the payment of the money, is taken from him forever, and so dead to him upon condition."³

1. *Breese v. Bange*, 2 E. D. Smith 474, 486.

2. *Coke Littleton*, 205-a.
3. Littleton, § 332, lib. 3, chap. 5.

Sec. 2. Definitions.

A chattel mortgage is an instrument by which the title to personal chattels is transferred to a mortgagee as security for the payment of a debt, or for the performance of an obligation, with a condition that upon payment or performance, the title shall revest in the mortgagor; but if the debt is not paid, or the obligation is not performed, the title becomes absolute in law in the mortgagee, though redeemable in equity.⁴

Sec. 3. Different from Real Estate Mortgage.

There is a manifest difference between a mortgage of real and a mortgage of personal property. The former is merely a security for the debt; the mortgagee has only a chattel interest, and the freehold remains in the mortgagor. A chattel mortgage, however, is more than a mere lien or security. By the latter the legal title to the property is transferred, subject to be defeated by the payment of the mortgage debt.⁵

Sec. 4. Incidental to Debt.

A chattel mortgage is but an accessory or incident to the debt. The debt and the mortgage cannot be separated. The mortgage

4. *Streeter v. Ward*, 12 St. Rep. 333. See also *Wait's Law and Practice* (7th ed.), vol. 1, p. 60.

Other Definitions. — "A chattel mortgage is a present transfer of the title to the property mortgaged, subject to be defeated on payment of the sum or instrument it is given to secure. In default of performance by the mortgagor of the condition, the title of the mortgagee becomes absolute." *Parshall v. Eggart*, 54 N. Y. 18.

"The idea of a chattel mortgage is that of a conveyance of personal property to secure the debt of the mortgagor; which, being conditional at the time, becomes absolute if, at a fixed time, the property is not redeemed." *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570.

A personal mortgage is more than a mere security. It is a sale of the thing mortgaged and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. *Butler v. Miller*, 1 N. Y. 496. *People v. Scudder*, 177 App. Div. 225, 163 N. Y. Supp. 739, *aff'd*, 221 N. Y. 670.

A mortgage is a sale of goods with a condition that, if the mortgagor pays, it shall be void. *Lewis v. Graham*, 4 Abb. Pr. 106; *Brownell v. Hawkins*, 4 Barb. 491.

5. *Rogers v. Traders' Ins. Co.*, 6 Paige 583; *Butler v. Miller*, 1 N. Y. 496; *People v. Remington & Sons*, 58 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*; *Noyes v. Wyckoff*, 30 Hun 466, *aff'd*, 114 N. Y. 204.

cannot exist as an independent debt. If the debt is assigned and the mortgage, by special agreement, does not accompany the debt, the mortgage is *ipso facto* extinguished and ceases to be a subsisting demand.⁶

Sec. 5. Title of Parties.

a. *Before Default.* — Before default in the condition of the mortgage, the legal title to the mortgaged chattels is in the mortgagee. But his title is conditional and liable to be defeated by a performance of the conditions. On such performance the title reverts in the mortgagor the same as before the execution of the instrument.⁷ But while this is so technically and theoretically, yet practically, the substantial title remains in the mortgagor with all the incidents of a legal title. He retains the use, control and benefit of the property subject to the mortgage. When entitled to possession before default, he can exercise many powers which ordinarily accompany the legal title to property. He may maintain an action for conversion against any wrongdoer taking the property even against the mortgagee;⁸ he may sell the mortgaged

6. *Langdon v. Buel*, 9 Wend. 80.

7. *Bank of Rochester v. Jones*, 4 N. Y. 497; *Bleakley v. Sullivan*, 140 N. Y. 175; *Stearns v. Oberle*, 47 Misc. 349, 94 N. Y. Supp. 37; *Gore v. Glover*, 49 Misc. 473, 97 N. Y. Supp. 969; *Matthews v. Victor Hotel Co.*, 132 N. Y. Supp. 375; *Stoddard v. Denison*, 7 Abb. Pr., N. S., 309, 38 How. Pr. 296; *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd* on other grounds, 52 N. Y. 185.

A mortgagee under a chattel mortgage takes title at once to the mortgaged chattels and retains it unless his title is divested by payment. *Stearns v. Oberle*, 47 Misc. 349, 94 N. Y. Supp. 37.

A mortgage transfers to the mortgagee the legal title to the property, and all that remains in the mortgagor is the mere right of redemption — a right to defeat the sale, by the

payment of the debt to secure which the title has been transferred, and thus revest himself with the title. *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546.

The title of the mortgagee becomes absolute only upon default in the performance of the condition. *Miner v. Judson*, 2 Hun 441.

Mortgage to Secure Surety. — Where one takes title simply to secure himself against loss as surety upon a bond, he has no interest that he can sell until after a breach in the condition of the bond. His title is both personal and contingent, and by an assignment before the contingency named has happened, he parts with his security without transferring any right to his assignee. *Comley v. Dazian*, 114 N. Y. 161.

8. *Moore v. Prentiss Tool and Supply Co.*, 133 N. Y. 148. See *infra*, the subdivision *Action at Law — Against Mortgagee*, p. 128.

property and convey a good title subject to the mortgage;⁹ and, in many cases, the property may be seized and sold by virtue of an execution against him.¹⁰

b. *After Default.*—Upon default in the payment of a chattel mortgage, by operation of law, the title of the mortgagee to the mortgaged property becomes absolute, and the mortgagor has no interest therein except a right to redeem—a mere right of action—enforceable only in a court of equity.¹¹ It is not necessary that a chattel mortgage declare that the defeasible title of the mortgagee will become absolute on the failure of the mortgagor to pay the sum when it becomes due; this result follows as an incident

9. See *infra*, the subdivision *Transfer of Property*, p. 126.

10. See *infra*, the subdivision *Levy Upon Mortgaged Chattels*, p. 163.

11. *West v. Crary*, 47 N. Y. 423; *Porter v. Parmley*, 52 N. Y. 185; *Judson v. Easton*, 58 N. Y. 664; *Bragelman v. Dane*, 69 N. Y. 69; *Casserly v. Witherbee*, 119 N. Y. 522; *Kimball v. Farmers & Mechanics' Nat. Bank*, 138 N. Y. 500; *Barrett Mfg. Co. v. Van Ronk*, 212 N. Y. 90; *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 329, *mem.*; *People v. Remington & Sons*, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*; *Darrow v. Wendelstadt*, 43 App. Div. 426, 60 N. Y. Supp. 174; *Cartier v. Pahst Brewing Co.*, 112 App. Div. 419, 98 N. Y. Supp. 516; *Schmidt v. Weeks*, 142 App. Div. 83, 127 N. Y. Supp. 39; *Kraus v. Black*, 56 Misc. 641, 107 N. Y. Supp. 609; *Saratoga Holding Co. v. Washburn*, 70 Misc. 110, 127 N. Y. Supp. 1016; *Phenix Nat. Bank v. Cleveland Co.*, 11 N. Y. Supp. 873, 34 St. Rep. 498; *Fidelity Loan Assoc. v. Connolly*, 92 N. Y. Supp. 252; *Niccloy v. Treasure*, 115 N. Y. Supp. 1030; *Farmers' Bank of Washington County v. Cowan*, 2 Abb. Dec. 88, 2 Keyes 217; *Stoddard v. Denison*, 7 Abb. Pr., N. S., 309, 38 How. Pr. 296; *Dane v. Mallory*, 16 Barb. 46; *Talman v. Smith*, 39 Barb.

390; *Ackley v. Finch*, 7 Cow. 290; *Burdick v. McVanner*, 2 Denio 170; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104 *rev'd* on other grounds, 52 N. Y. 185; *Powers v. Elias*, 21 J. & S. 480; *Halstead v. Swartz*, 1 T. & C. 559, 46 How. Pr. 289; *Woodbridge v. Nelson*, 6 Week. Dig. 248; *Patchin v. Pierce*, 12 Wend. 61.

Without Possession.—Upon default, the absolute title vests at once without possession in the mortgagee, and all the mortgagor has left is an equity of redemption. *Saratoga Holding Co. v. Washburn*, 70 Misc. 110, 127 N. Y. Supp. 1016.

The mortgagor retains an insurable interest in the mortgaged property, although he has disposed of the equity of redemption absolutely, so long as he is personally liable for the payment of the mortgage debt. By disposing of the property subject to the mortgage, it becomes the primary fund for the payment of the mortgage debt. The loss of the property, therefore, would be a direct loss to the mortgagor, who is personally responsible for the payment of the debt. *Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401.

to the relation of the parties.¹² The mortgagee, upon default, becomes the general owner of the mortgaged property;¹³ and, as far as the legal rights of the parties are concerned, he may treat the property as his own and squander, destroy, or give it away.¹⁴ The mortgagee, by selling the property, transfers to the purchaser a good legal title.¹⁵ The mortgagor, if permitted to retain possession of the property, holds merely as a bailee for the mortgagee.¹⁶

12. *Bragelman v. Dane*, 69 N. Y. 69.

13. *Casserly v. Witherhee*, 119 N. Y. 522.

14. *People v. Remington & Sons*, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd* on other grounds, 52 N. Y. 185.

15. *Rogers v. Traders' Ins. Co.*, 6 Paige 583.

Sale.—Upon the failure of a mortgagor to perform the condition of the mortgage, the title at law becomes absolute in the mortgagee or his as-

signs and he or they may sell the property at public or private sale; especially as against strangers. *Dane v. Mallory*, 16 Barb. 46.

Prime Facie the Absolute Owner.—One purchasing the mortgaged property from the mortgagee and taking possession after the forfeiture of the condition, at a time when there is no creditor in position to object to the sale, and continuing his possession, is to be deemed, *prime facie*, the absolute owner. *Talman v. Smith*, 39 Barb. 390.

16. *Fidelity Loan Assoc. v. Connolly*, 92 N. Y. Supp. 252.

CHAPTER II.

DISTINGUISHED FROM OTHER CONTRACTS.

- SEC. 1. In General.
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Sec. 1. In General.

The characteristic which distinguishes a chattel mortgage from other instruments is the condition that, if the debt is paid at the day specified, the conveyance is void, but, if payment is not so made, the transfer becomes absolute at law.¹ The instrument need

1. *Parshall v. Eggart*, 52 Barb. 367, *rev'd* on other grounds, 54 N. Y. 18; *Breese v. Bange*, 2 E. D. Smith 474.

Transaction, Held Not a Mortgage.—In *Ceas v. Bramley*, 18 Hun 187, it appeared that the defendant B., being a surety upon a note given by C., the plaintiff's intestate, to one M., agreed, after the maturity of the note, to remain liable as surety for one year longer and C. agreed to turn over to him a horse and, in case B. had to pay the note, the horse was to be his property and he was to have the right to take it; the horse was not present at the time this agreement was made, nor was it ever de-

livered to B.; the defendant, having paid the note, took the horse. In an action by the administrator of C. to recover the horse, it was held that the agreement was not a mortgage as there was no absolute sale defeasible upon condition, and that no title to the horse was thereby transferred to the defendant.

Instrument Held a Chattel Mortgage Between Certain Parties.—In *Yenni v. McNamee*, 45 N. Y. 614, it appeared that one S. was the owner and in the possession of a quantity of petroleum; his superintendent signed and delivered to him the following instrument: "Received on storage

not, in express terms, state that the mortgagee may take the goods.² Nor need the mortgagor promise to pay the debt secured, or be liable for its payment.³

Sec. 2. Sale.

A mortgage is one kind of a sale; it is a sale with a condition, the condition being that title shall revest in the mortgagor upon payment being made according to the terms of the contract. It is that condition which distinguishes a chattel mortgage from an absolute bill of sale.⁴ If a conveyance is taken as security it is a mortgage or pledge, but if taken in payment or part payment, thus extinguishing the debt, in whole or in part, it is a sale.⁵ A bill of sale, absolute on its face, but accompanied by an agreement,

for account of S., 600 barrels petroleum, crude and refined, contained in tanks, and 700 barrels to hold the same, deliverable to his order on payment of the charges named therein, in accordance with the marginal note below. Storage, per month, Labor, " No oil was set apart as covered or described by this receipt. The instrument was transferred by S. to B. for full value, as collateral security for a loan, the property all the while remaining at the factory. It was held that the instrument, as between S. and B., was in the nature of a chattel mortgage.

2. *Blake v. Corbett*, 120 N. Y. 327.

3. *Matthews v. Sheehan*, 69 N. Y. 585; *Blake v. Corbett*, 120 N. Y. 327.

Assignment, Held a Mortgage.—Where one defendant by the name of Crowley was indebted upon certain promissory notes, and another defendant, by the name of Corbett, executed and delivered to the plaintiff the following instrument: "For value received, I, Isabella Corbett, do hereby sell and assign the above mentioned books and described books to Henry A. Blake, his heirs and assigns, I to hold and retain possession of said books for eight months from this sale,

and if, during that period, the sum of indebtedness to said Blake, now owing to him by Richard Crowley, is paid or satisfied, for the payment of which this assignment is made as security, then this conveyance shall be null and void," it was held that the instrument contained all the essentials of a chattel mortgage and could be foreclosed as such. *Blake v. Corbett*, 120 N. Y. 327.

Assignment of Insurance Policy.—Where the plaintiff's testator procured an insurance policy upon his life and assigned the same to the defendant under an oral agreement that the latter was to pay the premiums and have the benefits of the policy, the testator, however, to have the privilege of redeeming at any time by paying the premiums advanced by the defendant with interest, it was held the assignment was a mortgage, to the validity of which it was not essential that the testator should have made an absolute promise to pay the advances. *Matthews v. Sheehan*, 69 N. Y. 585.

4. *Gore v. Glover*, 49 Misc. 473, 97 N. Y. Supp. 969.

5. *Keller v. Paine*, 34 Hun 167, *rev'd on other grounds*, 107 N. Y. 83.

in writing or by parol, operating as a defeasance, is a mere mortgage.⁶ A bill of sale with a separate defeasance is as clearly a mortgage as if the defeasance formed part thereof. Hence, where the owner of goods executes a bill of sale thereof and the vendee at the same time agrees to resell the property for the same sum and "deliver what remains of the property upon payment thereof," the transaction is a chattel mortgage.⁷ But the mere expectation on the part of the purchaser that the vendor will ultimately repurchase the property does not change the sale into a chattel mortgage.⁸ A bill of sale declaring that it is given to secure a debt and providing that the vendee may sell the goods to satisfy the debt, the surplus to be returned to the vendor is a chattel mortgage.⁹

An instrument, in the form of a bill of sale of chattels, in the absence of evidence that there has been a bargain between the parties by which one should sell and the other buy them, where it appears that the party receiving the bill of sale has signed, but has not been obliged to pay negotiable paper for the accommodation of the party giving the bill of sale, is to be treated as a chattel mortgage and must be filed in accordance with the statute in order to be valid against creditors.¹⁰ Thus, where a manufacturer pur-

Transferee to Prepare Property for Sale.—Where an absolute bill of sale of property is given as security for a debt, its effect as a chattel mortgage is not avoided by a stipulation that the transferee shall complete the process of manufacturing the assigned property and prepare the same for sale. *Smith v. Beattie*, 31 N. Y. 542.

6. *Smith v. Beattie*, 31 N. Y. 542; *Sheldon v. McFee*, 216 N. Y. 618; *Gore v. Glover*, 49 Misc. 473, 97 N. Y. Supp. 969; *Clark v. Henry*, 2 Cow. 324.

7. *Dickinson v. Oliver*, 96 App. Div. 65, 89 N. Y. Supp. 52; *same case*, 195 N. Y. 238.

8. *Fisher v. Stout*, 74 App. Div. 97, 77 N. Y. Supp. 945.

9. *Bissell v. Hopkins*, 3 Cow. 166; *Marsh v. Lawrence*, 4 Cow. 461.

A bill of sale, or assignment of goods, declaring that the object is to

secure the vendee as surety for the vendor, and that in case the vendee shall become liable, that he may turn the goods out on execution, or that they shall be at his disposal at private sale, accounting to the vendor for the proceeds, is in the nature of a mortgage. *Marsh v. Lawrence*, 4 Cow. 461.

Instrument Giving Vendee Power to Sell Property.—A bill of sale of personal property, possession of which is not surrendered, providing that the person to whom the bill of sale is given may sell the property covered by it if the debt secured thereby is not paid to him within a certain time, is, in legal effect, a chattel mortgage with a power of sale. *Wellington v. Morey*, 12 Week. Dig. 476, *aff'd*, 90 N. Y. 656, *mem.*

10. *Woodworth v. Hodgson*, 56 Hun 236, 9 N. Y. Supp. 750.

chased wool to be paid for by his note indorsed by another person, for the accommodation of such manufacturer, and, at the time of such indorsement, the manufacturer executed to the indorser a writing reciting that the latter had indorsed the note to be used in purchasing the wool and declaring that the wool and the cloth to be manufactured therefrom should belong to such indorser until the note was paid, it was held that the transaction was a mere mortgage.¹¹

Where, upon the dissolution of a partnership, one partner executed to the other a bill of sale of his interest in the partnership property and the parties signed an agreement that the latter employed the former as his agent to sell the goods, the partner acting as such agent to retain the net profits for his services and to purchase the property by payments to be made in installments, it was held that the instrument executed by the partner acting as agent was in effect a chattel mortgage.¹² Where a person, upon obtaining \$200 from another, told the latter she would return it if she could, or, if not, that she would sell certain property to him for \$1,000, if he could make an arrangement, it was held that whether the transaction was an absolute sale or a chattel mortgage was a question for the jury.¹³ Where an instrument recited that the first party named therein, in consideration of a specified sum paid to him, had bargained and sold to the second party certain property, and that the property so transferred was in the possession of the first party, but the instrument contained no promise or agreement to pay any sum of money to the second party, it was held that the instrument was a bill of sale and not a chattel mortgage.¹⁴

Although a bill of sale may be regarded as fraudulent if the property transferred greatly exceeds in value the amount of the consideration, such inadequacy of consideration does not affect the validity of a mortgage.¹⁵

11. *Thompson v. Blanchard*, 4 N. Y. 303.

14. *Wheeler v. Eastwood*, 88 Hun 160, 34 N. Y. Supp. 513.

12. *Bragelman v. Dane*, 69 N. Y. 69.

15. *Preston v. Southwick*, 115 N. Y.

13. *Goodwin v. Kelly*, 42 Barb. 194.

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Sec. 3. Construction of Bill of Sale as Mortgage.

A bill of sale, absolute upon its face, may be shown by parol evidence to be only a mortgage.¹⁶ No matter what the form of the instrument is, if intended merely as security, it may be shown to be a mortgage and must be so treated.¹⁷ The mortgagor need not show fraud or mistake in the transaction.¹⁸ He may have the bill of sale adjudged to be a chattel mortgage, though he claims

16. *Despard v. Walbridge*, 15 N. Y. 374; *Smith v. Beattie*, 31 N. Y. 542; *West v. Crary*, 47 N. Y. 423; *Matthews v. Sheehan*, 69 N. Y. 585; *Coe v. Cassidy*, 72 N. Y. 133; *Barry v. Colville*, 129 N. Y. 302; *Susman v. Whyard*, 149 N. Y. 127; *Donnelly v. McArdle*, 86 App. Div. 33, 83 N. Y. Supp. 193; *Heise v. Selected Securities Co.*, 105 N. Y. Supp. 1079; *Parmenter v. Fitzpatrick*, 14 N. Y. Supp. 748, 38 St. Rep. 367, *rev'd* on other grounds, 48 St. Rep. 80; *Tyler v. Strang*, 21 Barb. 198; *Patchin v. Pierce*, 12 Wend. 61.

Assignment of Contract.—Parol evidence may be given to show that an assignment of a contract absolute upon its face was intended as a mortgage. *Tyler v. Strang*, 21 Barb. 198.

An assignment of a lease may be shown by parol to be a mortgage; and where the assignee of a lease sues a subtenant of the original lessee for the rent, the subtenant may show that the assignment of the lease was merely as a security for a debt and that such debt has been paid. *Despard v. Walbridge*, 15 N. Y. 374.

An assignment of a policy of life insurance, absolute on its face, may be shown by parol to have been given simply as security. *Matthews v. Sheehan*, 69 N. Y. 585.

A conveyance of a patent may be shown to be merely as security for a debt. *Barry v. Colville*, 129 N. Y. 302.

A bill of sale of a vessel, absolute in its terms, may be shown by parol evidence to be only a mortgage, though the bill of sale is recorded in the manner required for a transfer of a vessel and re-enrolled in the name of the transferee, and though an insurance policy is taken out in his name as owner and no bond or note taken by him. *Morgan v. Shinn*, 15 Wall. (U. S.) 105. And see *infra*, the chapter *Mortgages on Vessels*, p. 189.

17. *Coe v. Cassidy*, 72 N. Y. 133, 137.

Insufficient Proof of Mortgage.—Where a bill of sale was executed in payment of a precedent debt, the mere admission of the vendee, drawn from him by leading questions on cross-examination that the same was a "security for a debt," is not sufficient to fix the character of the instrument as a mortgage. *Prentiss Tool & Supply Co. v. Schirmer*, 17 N. Y. Supp. 662, 45 St. Rep. 20.

18. *Barry v. Colville*, 129 N. Y. 302. But see *Patchin v. Pierce*, 12 Wend. 61.

Effect of Failure to Prove Allegations of Fraud.—In an action to reform a bill of sale as a chattel mortgage, allegations in the complaint of false representations inducing the execution of the instrument may be disregarded as surplusage and the complaint will not be dismissed because the fraud is not proven. *Ricketts v. Wilson*, 26 Week. Dig. 193, 6 St. Rep. 508.

he did not know at the time he signed it that it was absolute in form.¹⁹ Even if the mortgagor concedes that he intended to execute an instrument absolute in form, if it was understood between the parties that the bill of sale was to be held only as security, the mortgagor may have such relief.²⁰ He should, however, explain satisfactorily why the instrument was drawn in the form of an absolute sale.²¹

A chattel mortgage, however, cannot operate as an absolute sale. The mortgagor's equity of redemption is zealously guarded by the courts and no agreement in a mortgage will be allowed to change it into an absolute conveyance upon any condition or event. There is no exception to the rule, "once a mortgage, and always a mortgage."²²

Sec. 4. Conditional Sale.

a. *In General.* — The term "conditional sale" is somewhat vague, for there are many kinds of conditional sales. A chattel mortgage is one kind. Another kind, the one commonly called a "conditional sale," arises where the vendor of property reserves the title thereto until the payment of the purchase price. But, as sales may be conditioned upon the happening of other events, numerous classes of conditional sales may arise. Generally a chattel mortgage is easily distinguished from the foregoing classes of conditional sales; but a question of serious difficulty is presented in distinguishing between a chattel mortgage and the transaction which is sometimes termed a "sale and conditional resale." In this latter transaction, the owner of property sells the same, and the purchaser agrees, upon the performance of some condition by the original vendor, to resell the same to such vendor.

b. *Reservation of Title Until Payment.* — The purchase price of an article sold may be secured in either of two ways: *first*, by a conditional sale through which the title is

19. *Donnelly v. McArdle*, 86 App. Div. 33, 83 N. Y. Supp. 193.

20. *Donnelly v. McArdle*, 86 App. Div. 33, 83 N. Y. Supp. 193.

21. *Donnelly v. McArdle*, 86 App. Div. 33, 83 N. Y. Supp. 193.

22. *Clark v. Henry*, 2 Cow. 324.

The reason of the rule is, because it puts the borrower too much in the power of the lender, who, being distressed at the time, is generally too much inclined to submit to any terms. *Clark v. Henry*, 2 Cow. 324.

reserved in the vendor until the purchase price is paid; *second*, by a chattel mortgage given back by the purchaser. While the object to be accomplished by either form of security is substantially the same, the rights of the parties under the two forms of security are materially different.²³ Upon the execution of a conditional sale of this class, the vendee has no title to the property, but, if the instrument is to be construed as a chattel mortgage, it is necessary that title should have passed from the mortgagor, who, by the instrument, vests the legal title in the mortgagee, subject to the usual rights of the mortgagor.²⁴ The instrument may be a conditional sale though it contains a clause that the vendor, in case of default in payment by the vendee, may take and sell the property and apply the proceeds to the balance unpaid, paying the surplus, if any, to the vendee.²⁵ A provision in the contract that the vendee is to have *full ownership* when he performs the conditions of the contract, and a provision that he takes possession as "tenant or bailee," are inconsistent with the idea of a transfer of actual title and generally require the instrument to be construed as a conditional sale.²⁶ Likewise, a provision in the agreement, that, when the price is paid in full, a bill of sale of the property will be given, is inconsistent with a claim that the title passed when the agreement was made.²⁷ The use of the term "sell" does not necessarily import an executed contract.²⁸

Where one D. G. Skinner purchased certain property of third parties and transferred it to E. & H. G. Gulick, the parties executing the following instrument: "E. and H. G. Gulick agree to pay D. G. Skinner, for the above machines and belting, time, services and expenses, the sum of \$810.75, within five months, and D. G. Skinner agrees to take the above amount, as above stated, but lends to said Gulicks the property above stated; and if they fail to pay, he is at liberty to take the property away, to enable him to realize the amount and interest. Prattsburgh,

23. *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856; *Gaul v. Goldburg Furniture & Carpet Co.*, 85 Misc. 426, 147 N. Y. Supp. 516.

24. *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856; *Gaul v. Goldburg Furniture & Carpet Co.*, 85 Misc. 426, 147 N. Y. Supp. 516.

25. *Brewster v. Baker*, 20 Barb. 364. 26. *Boon v. Moss*, 70 N. Y. 465. 27. *Fennikoh v. Gunn*, 59 App. Div. 132, 69 N. Y. Supp. 12.

28. *Fennikoh v. Gunn*, 59 App. Div. 132, 69 N. Y. Supp. 12.

March 29, 1852. (Signed) E. & H. G. Gulick, D. G. Skinner;" it was held that the instrument was a conditional sale, not a chattel mortgage.²⁹

Where the lessee of a hotel, who was the owner of the furniture therein, leased the hotel and furniture to another person for the remainder of his term and the sub-lessee agreed to keep the furniture insured and not to sell it or permit it to be moved, and the original lessee agreed to sell the furniture to such person at the expiration of the term if he fulfilled his covenants, and reserved the right to re-enter upon default and take possession of and sell the furniture, retaining from its proceeds the rent due him, and paying over the surplus to such sublessee, it was held that the transaction was a conditional sale.³⁰

Where the holder of an instrument treats it as a conditional sale by retaining the property for thirty days and selling the same pursuant to the provisions of the Personal Property Law (§§ 65 *et seq.*), he cannot afterward claim that the contract is a chattel mortgage and not a conditional sale.³¹

c. *Sale and Conditional Resale.* — It is sometimes difficult to determine whether a transaction constitutes a mortgage or an absolute sale and a conditional resale; and whether it shall be construed to be one or the other depends upon the intention of the parties as evidenced by the instrument executed, and all the circumstances of the case. In all doubtful cases a contract will be construed to be a mortgage rather than a conditional sale, because, in the case of a mortgage, the mortgagor, although he has not strictly complied with the terms of the mortgage, still has his right of redemption; while in the case of a conditional sale, without strict compliance, the rights of the conditional purchaser are forfeited.³² No general rule to distinguish the transactions can

29. *Grant v. Skinner*, 21 Barb. 581.

30. *Bean v. Edge*, 84 N. Y. 510.

31. *Powers v. Burdick*, 126 App. Div. 179, 110 N. Y. Supp. 883.

32. *Matthews v. Sheehan*, 69 N. Y. 585.

Intention of Parties. — The only safe criterion by which to determine whether a particular transaction con-

stitutes a mortgage or a conditional sale is the intention of the parties to be ascertained either from the terms of the written contract or "in proper cases from that instrument considered in connection with the circumstances attending its making. *Hughes v. Harlam*, 166 N. Y. 427, 431.

be laid down. The fact that there is no debt which can be personally enforced is a strong but not an absolutely controlling circumstance that the transaction is not a mortgage.³³ The relative value of the property and the price actually advanced or paid are to be taken into consideration to determine the intent of the parties.³⁴ It has been held that, in the absence of evidence of the inadequacy of the consideration, and of any personal liability of the vendor to refund, in any event, the money received as the price of the transfer, the covenant will be treated as a conditional sale.³⁵

Where the instruments of sale and conditional resale are merely security for a debt owing by the original vendor, the clause of resale is generally construed as a defeasance and the transaction is a chattel mortgage.³⁶ The fact that the term "resale" is employed will not change the transaction when no other sum than the amount of the indebtedness is mentioned or contemplated as the price of such resale.³⁷ Where the agreement is made upon an application for a loan of money, the court, for the purpose of preventing usury and extortion, will construe the agreement to be a mortgage.³⁸

An agreement transferring personal property subject to the condition that if the transferor pays the amount due upon a certain promissory note the transfer shall be void, but in the event of his death before payment, it shall become unconditional and absolute, the primary object of which was to provide security for a loan made to him, is a mortgage and not a conditional sale, and upon his death before the payment of the loan, his personal representative may redeem notwithstanding the provision for an absolute transfer, as such provision is void.³⁹

Where a debtor on promissory notes to the amount of \$225 executed to his creditor an assignment of a mortgage held by the debtor against a third party for \$1,065.03, and the notes were

33. *Matthews v. Sheehan*, 69 N. Y. 585. See also *Gomez v. Kampling*, 4 Daly 77.

34. *Robinson v. Cropsey*, 6 Paige 480.

35. *Quirk v. Rodman*, 5 Duer 285.

36. *Dickinson v. Oliver*, 96 App. Div. 65, 89 N. Y. Supp. 52; *same case*,

195 N. Y. 238; *Susman v. Whyard*, 149 N. Y. 127; *Robinson v. Cropsey*, 6 Paige 480.

37. *Susman v. Whyard*, 149 N. Y. 127.

38. *Robinson v. Cropsey*, 6 Paige 480.

39. *Hughes v. Harlam*, 166 N. Y. 427.

destroyed, and the creditor thereupon executed to the debtor a writing by which he promised to sell the mortgage to the debtor, if he would pay the \$225 by a certain day, and it appeared that the creditor several times before the day of payment declared that he held the assignment as security for his debt, it was held that the assignment was a mortgage and not a conditional sale.⁴⁰

Where a debtor gave his creditors a bill of sale of certain goods for the amount due, and, while retaining the possession of the goods, gave such creditors a storage receipt, acknowledging that he held the property for them, and it was verbally agreed that the debtor might have the goods again by paying the debt in a specified time, it was held that the transaction was a conditional sale, not a mortgage of the goods.⁴¹ Where a mortgagee, who was the landlord of a farm leased to the mortgagor, took possession of the property under the chattel mortgage and shortly afterward the mortgagor transferred his equity to the mortgagee, and four days thereafter the mortgagee agreed to give the original mortgagor an option to repurchase the property in two years, under which arrangement all the hay cut and crops raised upon the farm were to be and remain the property of the landlord, it was held that the latter agreement was not a chattel mortgage required to be filed as the title was previously in the landlord and was merely reserved there by the agreement.⁴² Where one tenant in common sold to his co-tenant his undivided share in the common property in consideration of the discharge of previous debts, and it was agreed that the vendee should convey to the vendor the whole property held in common, upon the payment of a specified sum at the end of one year, together with the value of the improvements made in the meantime, it was held that the transaction was a valid agreement of sale and repurchase and not a mere mortgage.⁴³

When the owner of a bond and mortgage, made by a third person, applies to another to make a loan on the security thereof, but the latter refuses to do so, but purchases them, at less than their face, and takes a transfer which recites a sale, at a sum named, and conveys them in pursuance thereof, the transaction will not

40. *Clark v. Henry*, 2 Cow. 324.

30 N. Y. Supp. 91, *aff'd*, 150 N. Y.

41. *Gomez v. Kamping*, 4 Daly

562, *mem.*

77.

43. *Robinson v. Cropsey*, 6 Paige

42. *Hawkins v. Beakes*, 80 Hun 292,

480.

be treated as being, in effect, a mortgage, merely because the purchaser gives his covenant to the vendor, to resell them to the latter, within a time named, and on conditions specified.⁴⁴

Sec. 5. Pledge.

a. *In General.* — There are two vital considerations which aid in distinguishing between a chattel mortgage and a pledge. *First*, in a chattel mortgage the legal title to the mortgaged property is transferred, but in a pledge the legal title is not generally thus transferred, the pledgee taking merely the right to retain the property as security for the indebtedness.⁴⁵ *Second*, in a chattel mortgage, the possession of the property may or may not be in the mortgagee, but, to construe the transaction as a pledge, it is essential that the pledgee have possession.⁴⁶

44. Quirk *v.* Rodman, 5 Duer 285.

45. Wilson *v.* Little, 2 N. Y. 443; People *v.* Scudder, 177 App. Div. 225, 163 N. Y. Supp. 739, *aff'd*, 221 N. Y. 670; People *v.* E. Remington & Sons, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*; Tedesco *v.* Oppenheimer, 15 Misc. 522, 37 N. Y. Supp. 1073; Lewis *v.* Graham, 4 Abb. Pr. 106; Huntington *v.* Mather, 2 Barb. 538, 6 N. Y. Leg. Obs. 206; Campbell *v.* Parker, 9 Bosw. 322; Cortelyou *v.* Lansing, 2 Cai. Cas. 200; Schoenrock *v.* Farley, 17 J. & S. 302; Breese *v.* Bange, 2 E. D. Smith 474; McFarland *v.* Wheeler, 26 Wend. 467.

The leading difference between a pledge and a mortgage is that the former is security for the payment of debt, while the latter is a conditional sale which becomes absolute by non-performance of the condition, which requires payment of a specified sum at a fixed day. Haskins *v.* Kelly, 1 Abb. Pr., N. S., 63, 24 Super. Ct. (1 Rob.) 160.

"A mortgage of goods is a pledge and more; for it is an absolute pledge to become an absolute interest, if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged; whereas a pawnee has but

a special property in the goods to detain them for his security." Brown *v.* Bement, 8 Johns. 96, 97.

"A mortgage is a sale of goods with a condition that if the mortgagor pays, it shall be void. A pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the one case the title passes to the mortgagees; in the other, the title remains in the pledgor, although possession is given to the pledgee." Lewis *v.* Graham, 4 Abb. Pr. 106.

46. People *v.* E. Remington & Sons, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*; Canton, etc., Dental Co. *v.* Webb, 16 N. Y. Supp. 932; Huntington *v.* Mather, 2 Barb. 538, 6 N. Y. Leg. Obs. 206; Brownell *v.* Hawkins, 4 Barb. 491; Campbell *v.* Parker, 9 Bosw. 322; Cortelyou *v.* Lansing, 2 Cai. Cas. 200; Barrow *v.* Paxton, 5 Johns. 258; McFarland *v.* Wheeler, 26 Wend. 467.

"The essential difference between them as a matter of right, is that in the one case the title passes, and in the other it does not. But the difference in substance and fact, is that in the case of a pawn or pledge, the

But these two distinctions do not conclusively dispose of the question whether a particular instrument is a mortgage or a pledge. In the case of a pledge, at least of intangible property, the title may pass to the pledgee.⁴⁷ The test of possession is useful only when possession is retained; when the possession accompanies the instrument it may be either a mortgage or a pledge.⁴⁸

Other characteristics distinguishing a pledge and chattel mortgage have been suggested. Thus, it has been said that one ground of distinction is that a pledge may be constituted without any contract in writing.⁴⁹ But this consideration is without force, for a verbal chattel mortgage is, in many cases, valid.⁵⁰ Another distinguishing feature has been advanced to the effect that in a pledge the debt exists independently.⁵¹ There seems to be no ground for such a distinction.⁵²

An instrument declaring that property mentioned therein is held by the person signing the same in his store for the account of other persons, subject to their order, as security for his note given that day for a specified sum, is not a chattel mortgage. If the property is delivered with the instrument, it may be a pledge, but when it is not delivered, it is nothing more than a contract for a pledge, which may become effectual as a pledge by a subsequent delivery of the property.⁵³

An assignment of a chattel mortgage as collateral security for a debt other than that covered by the mortgage itself amounts to a pledge of the mortgage and invests the pledgee with only a special property in the chattels mortgaged. Such a pledgee after default in the payment of the mortgage, the mortgagee being unable to deliver the chattels, is only entitled to recover the amount due under the mortgage although the chattels are of a greater value.^{53a}

Where property was delivered by the owner to his creditor, as security for a debt and an instrument was executed by the debtor by which he agreed that if he did not return by a certain time to

possession of the articles must pass out of the pawn; in the case of a mortgage it need not. And in determining whether an agreement is a pledge or a mortgage, regard must be had to these two considerations." *Haskins v. Patterson*, 1 Edm. Sel. Cas. 120, 122.

47. *Wilson v. Little*, 2 N. Y. 443.

48. *Huntington v. Mather*, 2 Barb. 538, 6 N. Y. Leg. Obs. 206.

49. *People v. E. Remington & Sons*, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*

50. *Terwilliger v. Ontario, Carbondale, etc., R. Co.*, 149 N. Y. 86; *Powers v. Freeman*, 2 Lans. 127; *Ceas v. Bramley*, 18 Hun 187; *Bardwell v. Roberts*, 66 Barb. 433.

51. See *Haskins v. Kelly*, 1 Abb. Pr. N. S., 63, 1 Rob. 160.

52. See *infra*, the subdivision *Action to Recover Debt*, p. 146.

53. *Parshall v. Eggart*, 54 N. Y. 18.

53a. *National Nassau Bank v. Cleary*, 171 App. Div. 540. *Cleary*, 171 App. Div. 540, 157 N. Y. Supp. 696.

pay the debt, the creditor might dispose of the property to pay the demand, it was held that the transaction was a pledge of the property, not a mortgage.⁵⁴ But where a person gave to another a regular bill of sale of certain horses for a consideration of \$210, and the latter at the same time gave to the former a writing or defeasance, engaging, on the payment of such sum in 14 days, to deliver the horses to him, it was held that the arrangement was a mortgage.⁵⁵

Where one obtained a loan from a trust company to purchase some electric cars, and agreed to store the cars in the name of the trust company until the loan was paid, it was held that the transaction was a mortgage, not a pledge.^{55a}

Where a person delivered a watch to another accompanied by the following instrument, it was held that the transaction was a mortgage, not a pledge: "New York, February 11th, 1867. I hereby agree to give up all claim to the watch, &c., if all claims due to you from me are not paid by the first of August, eighteen sixty-seven. Signed, James Poolman."⁵⁶

The following instrument has also been held a mortgage, not a pledge: "Iliion, N. Y., 9th April, 1885. H. D. Alexander, Cashier, National Mohawk Valley Bank, Mohawk, N. Y. Bought of E. Remington & Sons,— 1,000 Lee rifles, 433 Cal., A. B., 4 Boxes — \$15,500. Above goods are sold to H. D. Alexander, Cashier, and are held by him, as collateral security to and for the payment of our note C, No. 10,151, dated April 9th, 1885, at three months from date to order of and indorsed by P. Remington for ten thousand dollars and all renewals of the same. Said rifles are stored in the warehouse at the N. Y. C. R. R. freight depot, Iliion, N. Y., contained in 50 cases, each case marked 'A' and covered by receipt No. 163. Signed by C. R. Mentz. E. Remington & Sons. By E. Remington, Tr."⁵⁷

b. *Effect of Use of Term "Pledge."* — The mere use of the word "pledge" does not, of itself, determine that the instrument is a pledge.⁵⁸ Thus, where the chattel remained in the possession of a debtor, and an instrument given by him authorized the creditor to take possession thereof on non-payment of the debt, the instrument was held a chattel mortgage, although, instead of the ordinary terms of conveyance, it used the words, "I hereby pledge

54. *Brownell v. Hawkins*, 4 Barb. 491.

55. *Brown v. Bement*, 8 Johns. 96.

55a. *Gandy v. Collins*, 214 N. Y. 293.

56. *Bunacleugh v. Poolman*, 3 Daly 236.

57. *People v. E. Remington & Sons*, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 656, *mem.*

58. *Langdon v. Buel*, 9 Wend. 80; *Haskins v. Patterson*, 1 Edm. Sel. Cas. 120. See also *Ferguson v. Furnace Co.*, 9 Wend. 345.

and give a lien on.”⁵⁹ But where the word “pledge” is used and the possession of the property is transferred, the instrument will generally be deemed a pledge.⁶⁰

c. *Delivery of Stocks, Bonds, Etc., as Security.*—Where stocks, bonds, mortgages, or other valuable choses in action are transferred by a debtor to his creditor, as security for a debt, the transaction is generally a pledge.⁶¹ But a chose in action may be the subject of a mortgage and where the legal title thereto is transferred subject to the right of the debtor to pay the debt and redeem, the transaction may be a mortgage.⁶² And in a recent case, where certain stocks were delivered to another with an instrument whereby the owner “sold, assigned, transferred and conveyed” the same as collateral security for a debt, it was held that the transaction was a chattel mortgage, not a pledge.^{62a}

Sec. 6. Agreement to Give Mortgage.

Where property is delivered to vendees thereof under an agreement that they shall give the vendor a chattel mortgage thereon to secure the purchase price thereof, such arrangement gives the vendor an equitable lien upon the property, though the demand

59. *Langdon v. Buel*, 9 Wend. 80.

60. *Haskins v. Patterson*, 1 Edm. Sel. Cas. 120.

61. *Wilson v. Little*, 2 N. Y. 443; *Wheeler v. Newbould*, 16 N. Y. 392; *Garlick v. James*, 12 Johns. 146; *King v. Van Vleck*, 40 Hun 68, *aff'd*, 109 N. Y. 363; *Lewis v. Graham*, 4 Abb. Pr. 106; *Haskins v. Kelly*, 1 Abb. Pr., N. S., 63, 1 Rob. 160; *Campbell v. Parker*, 9 Bosw. 322; *Cortelyou v. Lansing*, 2 Cai. Cas. 200. See also *Hasbrouck v. Vandervoort*, 4 Sandf. 74.

62. *Promissory Note.*—Where a debtor deposits with his creditor a promissory note as collateral security for a debt, the transaction is a pledge. *Garlick v. James*, 12 Johns. 146.

Where, by a written agreement, A. delivered to B. a note of a third party for 200 bushels of wheat valued at \$200 and agreed, in case the wheat did not pay for such sum, to make up the deficiency; and B. thereby gave to A. the power of redeeming the note, by paying \$186 and interest at any time within six months of the time the note was payable, it was held that the note was deposited as a pledge. *McLean v. Walker*, 10 Johns. 471.

Assignment of Chattel Mortgage.—Where a mortgagor of chattels borrows money to buy in the mortgage, and procures an assignment of it to the lender, as security for the repayment of the loan, the mortgage becomes in the hands of the latter a mere pledge for the loan and is discharged by a tender thereof. *Haskins v. Kelly*, 1 Abb. Pr., N. S., 63, 1 Rob. 160.

Certificates of Stock.—An agreement, whereby the maker of notes delivers certificates of stock as collateral security for the payment of the notes, stipulating that if the notes are not paid at maturity the securities shall be under the control of the holder who is authorized to dispose of them, and to apply the proceeds to the credit of the maker, is a pledge, not a mortgage. *Lewis v. Graham*, 4 Abb. Pr. 106.

62. *King v. Van Vleck*, 40 Hun 68, *aff'd*, 109 N. Y. 363. See also *Huntington v. Mather*, 2 Barb. 538.

62a. *People v. Scudder*, 177 App. Div. 225, 163 N. Y. Supp. 739, *aff'd*, 221 N. Y. 670.

for the chattel mortgage is not made until some time after the delivery of the property. Such equitable lien is enforceable against the vendees and persons claiming under them, not *bona fide* purchasers. But the failure of the vendors to demand the mortgage upon the delivery of the property, vests the legal title thereto in the vendees; and the vendor cannot recover the same in an action at law but must resort to a suit in equity.⁶³ But, if a contract to give a mortgage is not filed, it is not enforceable as an equitable lien as against third parties where the mortgage, if executed but not filed, would be void as against such parties.⁶⁴

Sec. 7. General Assignment.

The material and essential characteristic of a general assignment is the presence of a trust. The assignee is merely a trustee and not an absolute owner. He buys nothing and pays nothing, but takes the title for the performance of trust duties.⁶⁵ A general assignment is distinguished from a chattel mortgage upon the further ground that the former covers *all* the property of the assignor.⁶⁶ An assignment by a debtor of all his property in trust for the benefit of a particular class of creditors, reserving the surplus to himself is fraudulent and void, but this principle does not apply where the assignment is to creditors for the purpose of securing their demands. Such a transfer, whatever may be its form, is in legal effect only a mortgage.⁶⁷

Sec. 8. Assignment in Trust.

By statutory enactment, a transfer of personal property, in trust for the use of the person making it, is void as against existing or

63. *Husted v. Ingraham*, 75 N. Y. 251.

64. *Bell v. New York Safety Steam Power Co.*, 183 Fed. 274. See also *infra*, the subdivision *Operation as Equitable Lien*, p. 33.

65. *Brown v. Guthrie*, 110 N. Y. 436.

66. *Brown v. Guthrie*, 110 N. Y. 435.

When a chattel mortgage, executed and delivered by a debtor to one of his creditors, and a transfer of busi-

ness accounts to a third person, do not cover all the debtor's property and are only intended to secure the payment of debts of the mortgagees and certain other creditors mentioned therein, they are not within the statute which regulates the making of general assignments for the benefit of creditors. *Delany v. Valentine*, 154 N. Y. 692.

67. *Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131.

subsequent creditors of such person.⁶⁸ Where the assignment is made to the creditors themselves for the purpose of securing their particular demands, though the surplus of the property after the satisfaction of their demands is to be rendered to the assignor, the instrument is in legal effect only a chattel mortgage and is not vitiated by such statute.⁶⁹ An assignment by a debtor of his property to his creditor, in trust to sell and pay his own debt, reserving the surplus to the debtor or his assignees, is in effect a mortgage,⁷⁰ and where the debt which it is designed to secure is paid, the property reverts to the original owner.⁷¹

Sec. 9. Lease Reserving Lien.

A clause in a lease reserving to the landlord, as security for the rent, a lien upon property brought or crops grown upon the demised premises is not, strictly speaking, a chattel mortgage.⁷² Upon the execution of a lease providing that the lessor shall have a lien upon the crops which may be enforced by the taking and selling of such property, the title to the crops is not thereby transferred to the landlord as title is transferred to a chattel mortgagee. The landlord does not acquire title until possession is taken or the instrument foreclosed.⁷³ While such an instrument does not pass title to property not in existence or not yet acquired at law, it gives the lessor a license to seize the property and title thereto passes upon seizure; in equity, the beneficial interest to the property is transferred and, upon its acquisition or coming into existence, title

68. Pers. Prop. L., § 34. And see *infra*, the subdivision, *Fraudulent Trust*, p. 118.

69. *Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131; *Delany v. Valentine*, 154 N. Y. 692.

70. *Dunham v. Whitehead*, 21 N. Y. 131; *McClelland v. Remsen*, 36 Barb. 622, 14 Abb. Pr. 331, 23 How. Pr. 175, *aff'd*, 3 Abb. Dec. 74; 5 Abb. Pr., N. S., 250.

A bill of sale, made to a party to secure a debt, with the agreement that all the proceeds of the property over and above the amount of the

debt shall be placed at the disposal of the party by whom the bill is made and his creditors, is not an assignment under our assignment laws but is merely a mortgage with possession in the mortgagee. *Nichols v. Lyon*, 14 St. Rep. 549.

71. *McClelland v. Remsen*, 36 Barb. 622, 14 Abb. Pr. 331, 23 How. Pr. 175, *aff'd*, 3 Abb. Dec. 74, 5 Abb. Pr., N. S., 250.

72. *Streeter v. Ward*, 12 St. Rep. 333; *Milliman v. Neher*, 20 Barb. 37.

73. *Streeter v. Ward*, 12 St. Rep. 333.

is transferred without the intervention of any new act.⁷⁴ Such a lien is enforceable to the same extent against third parties having no rights superior to those of the tenant.⁷⁵ Thus, if the lease is duly filed as a chattel mortgage, a subsequent purchaser, though without knowledge of the provision in the lease, takes title subject to the landlord's claim.⁷⁶ A lease reserving such a lien, however, operates as a chattel mortgage and is required to be filed as against creditors, etc.⁷⁷ The reserved lien is valid and enforceable between the parties, but, if not filed, is void as to creditors or subsequent purchasers or mortgagees in good faith.⁷⁸ A lease may contain a provision that the ownership of crops shall remain in the landlord until the tenant pays the rent or gives security therefor. Under such a contract, the title to the crops vests in the landlord as soon

74. McCaffrey *v.* Woodin, 65 N. Y. 459; Wismer *v.* Ocumpaugh, 71 N. Y. 113; Reynolds *v.* Ellis, 103 N. Y. 115; Nestell *v.* Hewitt, 19 Abb. N. C. 282.

75. Wismer *v.* Ocumpaugh, 71 N. Y. 113; Reynolds *v.* Ellis, 103 N. Y. 115.

76. Smith *v.* Taber, 46 Hun 313, 14 St. Rep. 644.

77. Duffus *v.* Bangs, 122 N. Y. 423; Reynolds *v.* Ellis, 34 Hun 47, *aff'd*, 103 N. Y. 115; Thomas *v.* Bacon, 34 Hun 88; Betsinger *v.* Schuyler, 46 Hun 349, 12 St. Rep. 377; Hare *v.* Follett, 17 N. Y. Supp. 559; Steffin *v.* Steffin, 4 Civ. Pro. R. 179; Johnson *v.* Crofoot, 53 Barb. 574, 37 How. Pr. 59.

Subsequent Mortgagee.—A provision in a lease of real estate, rented for the purpose of raising nursery stock, that the lessor should have a lien, as security for the payment of the rent, upon the growing crops, fruits, etc., raised upon the premises, where the lease is not filed as a chattel mortgage, does not affect the right of a subsequent mortgagee and purchaser under mortgage foreclosure, where he had no knowledge of the provision in the lease. Duffus *v.* Bangs, 122 N. Y. 423.

Filing of Instrument Not Required.

—In Hawkins *v.* Beakes, 80 Hun 292, 30 N. Y. Supp. 91, *aff'd*, 150 N. Y. 562, *mem.*, it appeared that the plaintiff took possession of all the property of his tenant under a chattel mortgage and the mortgagor thereupon conveyed to him the equity; four days thereafter the landlord agreed to give the tenant an option to repurchase the property in two years, under which arrangement all the hay and crops raised upon the farm were to be and remain the property of the landlord; it was held that this latter contract was not in the nature of a chattel mortgage and was not required to be filed.

78. Thomas *v.* Benton, 34 Hun 88; Betsinger *v.* Schuyler, 46 Hun 349, 12 St. Rep. 377; Steffin *v.* Steffin, 4 Civ. Pro. R. 179; Johnson *v.* Crofoot, 53 Barb. 574, 37 How. Pr. 59.

Creditor Levying Upon Tenant's Interest.—Where an agreement for the cultivation of land upon shares provided that the title to all the property raised or produced should be and remain in the owner of the land until the fulfillment of the contract, it was held that such agreement, not having been filed, was invalid as against an

as they come into existence. The only interest the tenant has is the right to acquire the property when he performs the conditions; such an interest is not subject to execution though it may be reached by creditors in an equitable proceeding.⁷⁹ Where an agreement to work a farm on shares provided that the owner should make certain advances to the worker to enable him to carry on the work, and that the title to the crops should remain in the owner until the advances were fully repaid, it was held that the instrument was not in the nature of a chattel mortgage and was not required to be filed and that the worker, before the payment of the advances, had no interest in the crop which was capable of transfer to a third party as against the landlord.⁸⁰

Where an agreement was made between the landlord and the tenant of a farm that the tenant should take good care of the cows and, in case the hay raised upon the farm failed to winter them, the landlord would supply the deficiency at the rate of three dollars per ton, and, if there was a surplus, the landlord should have it and pay the tenant three dollars a ton therefor, it was held that the agreement did not place the title of the hay in the landlord.⁸¹ Where, under a lease of a farm and seven cows, the landlord agreed to furnish sufficient hay to keep the cows "to grass" and the tenant agreed to pay the rent and to feed out all the fodder on said farm that was raised on the farm and to winter the stock "through to grass in the spring of 1884 on hay," it was held that the title to the hay was in the tenant and was subject to sale under execution against him.⁸² Where a lease of a farm contained a clause that the butter and crops made

execution levied upon the undivided interest of the tenant in the crops under a judgment against him. *Hare v. Follett*, 17 N. Y. Supp. 559.

Remedy of Creditor.—Where a clause in a lease reserving a lien upon crops is inoperative as against the creditors of the tenant, because the instrument is not properly filed, a creditor, if the lease is used as a fraudulent obstruction to the enforcement of his execution, may invoke the aid of a court of equity to remove the obstruction in aid of the execu-

tion. In such cases, it is not necessary to have the execution returned unsatisfied as a condition precedent of the right of a court of equity to take jurisdiction. *Steffin v. Steffin*, 4 Civ. Pro. R. 179.

79. *Andrew v. Newcomb*, 32 N. Y. 417. See also *Hare v. Follett*, 17 N. Y. Supp. 559.

80. *Booker v. Stewart*, 75 Hun 214, 27 N. Y. Supp. 114.

81. *McCombs v. Becker*, 3 Hun 342.

82. *Hawkins v. Giles*, 45 Hun 318.

by the tenant were to be under the control of the landlord until the rent was paid but should not be sold by the landlord prior to the 1st day of January in any year without the consent of the tenant, it was held that the landlord did not have any lien upon or title to such farm produce.⁸³

83. *Hess v. Sprague*, 13 Week. Dig. 164.

CHAPTER III.

SUBJECTS OF MORTGAGE.

Sec. 1. Chose in Action.

- a. In General.
- b. Liquor Tax Certificate.
- c. Bill of Lading or Warehouse Receipt.

2. Property Not Owned by Mortgagor.

- a. In General.
- b. Property Fraudulently Obtained by Mortgagor.
- c. After-acquired Property.
- d. Property Not in Existence.
- e. Property Potentially in Existence.
- f. Crops.
- g. Operation as Equitable Lien.

3. Growing Trees.**4. Fixtures.****5. Rolling Stock.****6. Chattels Real.****7. Future Estate.****8. Stock of Goods.****9. Vessels.****Sec. 1. Chose in Action.**

a. *In General.* — The statutory provisions concerning chattel mortgages relate to mortgages on "goods and chattels." The term "chattels," as used in the statute, refers to things that can be used, handled and transported, as horses, carriages, furniture, machinery, tools and the numberless objects to be seen about us in every-day life, the value of which is in the possession of the thing itself.¹ But the application of the statute to goods and chattels does not forbid the transfer of other kinds of personal property, such as choses in action, by way of mortgage. In fact, a mortgage of the latter may be a more effective security to the mortgagee for the filing thereof is not required.² Thus, a valid mortgage has

1. *Niles v. Mathusa*, 162 N. Y. 546. 2. See *Niles v. Mathusa*, 162 N. Y. 546.

been made of a contract,³ an insurance policy,⁴ a mortgage,⁵ a lease,⁶ and a copyright.⁷ Choses in action do not pass under general words in a conveyance.⁸ Where a chose in action is delivered to a creditor as security for a debt, the transaction is generally a pledge, not a mortgage.⁹

b. *Liquor Tax Certificate.* — A liquor tax certificate is personal property but is not a chattel within the meaning of the Lien Law and a transfer thereof as security for a loan need not be filed as a chattel mortgage. The transfer is valid though it is not filed.¹⁰ A mortgage of a liquor tax certificate and the renewal thereof gives the mortgagee no right to a renewal certificate subsequently issued, because it was not in existence when the mortgage was given. The mortgage, however, is good in equity as a contract to assign the new certificate when acquired.¹¹ Where a liquor tax certificate is assigned by the holder to the person lending the money for its procurement, as security for the repayment of the loan, the assignee is entitled to its possession as against a receiver in supplementary proceedings of the property of the apparent owner who has come into possession thereof.¹²

3. *Hart v. Taylor*, 82 N. Y. 373; *Tyler v. Strang*, 21 Barb. 198.

An assignment of a contract for the manufacture of a safe and a power of attorney to collect the purchase price, as security for a loan, gives the assignee the right to collect the money for the safe when due but does not give him any lien or right to the possession of the safe. *Hart v. Taylor*, 82 N. Y. 373.

4. *King v. Van Vleck*, 109 N. Y. 363.

5. *Hoyt v. Martense*, 16 N. Y. 231; *Harrison v. Burlingame*, 48 Hun 212; *Clark v. Henry*, 2 Cow. 324; *Slee v. Manhattan Co.*, 1 Paige 48.

6. *Despard v. Walbridge*, 15 N. Y. 374; *Booth v. Kehoe*, 71 N. Y. 341. See also *Johnston v. Flickinger*, 97 Misc. 169, 160 N. Y. Supp. 962.

7. See *Hall v. Ditson*, 5 Abb. N. C. 198.

8. *General Electric Co. v. Wightman*, 3 App. Div. 118, 39 N. Y. Supp. 420.

9. See *supra*, the subdivision *Pledge*, p. 16.

10. *Niles v. Mathusa*, 162 N. Y. 546; *Koehler & Son Co. v. Flebbe*, 21 App. Div. 210, 47 N. Y. Supp. 369. See also *People v. Durante*, 19 App. Div. 292, 45 N. Y. Supp. 1073.

11. *McNeeley v. Welz*, 166 N. Y. 124; *Anchor Brewing Co. v. Burns*, 32 App. Div. 272, 53 N. Y. Supp. 1005.

An assignment of a liquor tax certificate in the nature of a mortgage covering a certificate already issued and also for any renewal or subsequent certificate does not give the mortgagee a right to the renewal certificate as against a person who advanced the money for the renewal and took an assignment thereof in similar form. *Anchor Brewing Co. v. Burns*, 32 App. Div. 272, 52 N. Y. Supp. 1005.

12. *Koehler & Son Co. v. Flebbe*, 21 App. Div. 210, 47 N. Y. Supp. 369.

c. *Bill of Lading or Warehouse Receipt.* — The delivery of a bill of lading or warehouse receipt as security for a debt has the effect of transferring the property represented thereby and such delivery may constitute a mortgage of the property.¹³

Sec. 2. Property Not Owned by Mortgagor.

a. *In General.* — It is essential to the validity of a chattel mortgage that the mortgagor have some interest in the property he assumes to thus transfer.¹⁴ But a mortgagor may agree to mortgage property not then owned or to give a lien upon it as soon as he gets it and equity will enforce the agreement and establish the lien.¹⁵

b. *Property Fraudulently Obtained by Mortgagor.* — Although a thief can acquire no title to property stolen, a person in possession of chattels, though he acquired his possession by a fraudulent purchase, may give a good title thereto to a *bona fide* mortgagee. The title of such a mortgagor is not void, but voidable, and is good until avoided by the person defrauded.¹⁶ Where, however, the mortgage is given to hinder, delay, and defraud the creditors of the mortgagor,¹⁷ or to secure an existing indebtedness,¹⁸ the mortgagee is not entitled to the rights of a *bona fide* mortgagee, and his rights are inferior to those of the original vendor who has exercised his option to avoid the sale. In an action by the original vendor to recover the value of the property, he is entitled, even as against the mortgagee, to rest upon proving the fraud in the original purchase, and the burden is upon the latter to prove that the mortgage was taken in good faith.¹⁹

13. *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Bank of Rochester v. Jones*, 4 N. Y. 497; *Farmers & Mechanics' Nat. Bank of Buffalo v. Lang*, 87 N. Y. 209.

14. *National Bank of Deposit v. Rogers*, 166 N. Y. 380; *Crandall v. Brown*, 18 Hun 461; *Farmers' L. & T. Co. v. Long Beach Improvement Co.*, 27 Hun 89; *Brunswick-Balke-Collender Co. v. Stephenson*, 4 N. Y. Supp. 123; *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856; *Stewart v. Fidelity Loan Assoc.*, 19 Misc. 49, 42 N. Y. Supp. 705. See

also *McEchron v. Martine*, 111 App. Div. 805, 97 N. Y. Supp. 951; *Church v. Lapsham*, 94 App. Div. 550, 88 N. Y. Supp. 222.

15. *National Bank of Deposit v. Rogers*, 166 N. Y. 380, 390. See also *infra*, the subdivision *Operation as Equitable Lien*, p. 33.

16. *Lembeck, etc., Brewing Co. v. Sexton*, 184 N. Y. 185.

17. *Moyer v. Bloomingdale*, 38 App. Div. 227, 56 N. Y. Supp. 991.

18. *Van Slyck v. Newton*, 10 Hun 554.

19. *Moyer v. Bloomingdale*, 38 App. Div. 227, 56 N. Y. Supp. 991.

c. *'After-acquired Property.'* — A mortgage of property to be subsequently acquired is not effective in passing the title of such property to the mortgagee.²⁰ Such a mortgage may, however, be construed as an agreement to give a mortgage on such property when acquired and may thus operate as an equitable lien thereon.²¹ At law the mortgagee has no title to the property but has a license

20. *Gardner v. McEwen*, 19 N. Y. 123; *Yates v. Olmstead*, 56 N. Y. 632; *Kribbs v. Alford*, 120 N. Y. 519; *McNeeley v. Welz*, 166 N. Y. 124; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815; *Medina, etc., Light Co. v. Buffalo, etc., Safe Deposit Co.*, 119 App. Div. 245, 104 N. Y. Supp. 625; *Denier v. Bonewur*, 134 App. Div. 577, 119 N. Y. Supp. 313; *Beebe v. Richmond L. H. & P. Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *Brunswick-Balke-Collender Co. v. Stephenson*, 4 N. Y. Supp. 123; *Otis v. Sill*, 8 Barb. 102; *Conderman v. Smith*, 41 Barb. 404; *Levy v. Welsh*, 2 Edw. Ch. 438.

21. *Wismer v. Ocumpaugh*, 71 N. Y. 113; *Kribbs v. Alford*, 120 N. Y. 519; *McNeeley v. Welz*, 166 N. Y. 124; *National Bank of Deposit v. Rogers*, 166 N. Y. 380; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Kennedy v. National Union Bank of Watertown*, 23 Hun 494; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815; *Denier v. Bonewur*, 134 App. Div. 577, 119 N. Y. Supp. 313; *Beebe v. Richmond L. H. & P. Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *Stevens v. Watson*, 4 Abb. Dec. 302. See also *infra*, the subdivision *Operation as Equitable Lien*, p. 33.

Upon Goods to Be Manufactured from Raw Material Not on Hand.—A chattel mortgage given by a manufacturing corporation upon all the goods of a designated kind manufactured, and in the process of manufac-

ture, at its mills, and upon all of such goods thereafter to be manufactured, or in process of manufacture, and upon all the raw material on hand, or thereafter to be on hand, in the absence of fraud, may be construed as a contract to give a lien upon raw material and upon the goods to be manufactured therefrom, which will take effect, as between the parties, as soon as property of either kind comes into the ownership of the mortgagor. *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815.

Invalid in Law, Yet Operative in Equity. — It is sometimes said that a mortgage on after-acquired property is invalid in law, yet operative in equity. In *Kribbs v. Alford*, 120 N. Y. 519, the court discussing this apparent solecism, said: "Invalidity at law imports nothing more than that a mortgage of property thereafter to be acquired is ineffectual as a grant to pass the legal title. A court of equity, in giving effect to such a provision, does not put itself in conflict with that principle. It does not hold that a conveyance of that which does not exist operates as a present transfer in equity, any more than it does in law. But it construes the instrument as operating by way of present contract, to give a lien, which, as between the parties, takes effect and attaches to the subject of it as soon as it comes into the ownership of the party."

to seize the property when it is acquired by the mortgagor.²² Upon such seizure, title passes to the mortgagee.²³

A mortgage upon a retail stock of goods which purports to cover goods to be purchased in the future is effective only as an equitable lien.²⁴ But such a mortgage, if otherwise valid, is not void because it professes to cover after-acquired property; it may be good as to the previously acquired property.²⁵ A railroad is authorized to borrow such sums of money as may be necessary for completing and finishing or operating or improving its railroad, or for any other of its lawful purposes and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its property and franchises to secure the payment of any debts contracted for such purposes.²⁶ A mortgage given under such statutory authority covers property subsequently acquired, either realty or personality.²⁷

Where the owner of a vessel, after executing a mortgage thereon, removed old and worn-out sails and replaced them with a new set, it was held that the new sails were covered by the mortgage.²⁸

d. *Property Not in Existence.* — A chattel mortgage requires a subject *in esse*, and, at law, conveys no title to the mortgagee when given upon property not owned, either actually or potentially,

22. McCaffrey *v.* Woodin, 65 N. Y. 459; Kennedy *v.* National Union Bank of Watertown, 23 Hun 494.

Possession by Mortgagee. — A mortgage covering all machinery and tools and all lumber and stock owned by a firm or that may thereafter be owned by the partners conveys to the mortgagee title to such subsequently acquired property where he takes possession before any rights of third parties intervene. Kennedy *v.* National Union Bank of Watertown, 23 Hun 494.

23. McCaffrey *v.* Woodin, 65 N. Y. 459; Perkins *v.* Batterson, 66 Hun 583, 21 N. Y. Supp. 815.

24. Ludwig *v.* Kipp, 20 Hun 265; Stewart *v.* Fidelity Loan Assoc., 19 Misc. 49, 42 N. Y. Supp. 705; Levy *v.* Welsh, 2 Edw. Ch. 438.

25. Gardner *v.* McEwen, 19 N. Y. 123; Yates *v.* Olmstead, 56 N. Y. 632;

Skilton *v.* Codington, 185 N. Y. 80. See also *infra*, the subdivision *Reservation by Mortgagor of Disposal of Property*, p. 108, and *infra*, the chapter *Mortgage on Stock of Goods*, p. 186.

26. Railroad Law, § 8, subd. 10.

27. Platt *v.* New York & Sea Beach R. Co., 9 App. Div. 87, 41 N. Y. Supp. 42, wherein the court said: "By the terms of the law, therefore, it was contemplated that, for the money thus obtained the property acquired should be pledged as the security for its repayment, and this cannot be accomplished without holding that the lien of the mortgage attaches to such property as shall be necessary for that purpose, whether it is in existence at the time when the mortgage is given or is subsequently acquired, and whether such property be such as is denominated real or personal."

28. Southworth *v.* Isham, 3 Sandf. 448.

by the mortgagor.²⁹ But when the property comes into existence and in the ownership of the mortgagor, in equity such a mortgage will operate as an equitable lien.³⁰ And at law, the mortgage gives the mortgagee a license to seize the property and title passes to the mortgagee upon such seizure.³¹

No legal lien is created by a mortgage upon property not in existence; the lien is purely equitable.³² Upon default, the mortgagee does not become the legal owner of the property. To obtain a title, good as against third parties, he must seize the property or foreclose his equitable lien.³³

A mortgage of property to be manufactured does not of itself pass title to such property nor create a legal lien thereon.³⁴

29. *Edgell v. Hart*, 9 N. Y. 213; *McCaffrey v. Woodin*, 65 N. Y. 459; *Hart v. Taylor*, 82 N. Y. 373; *Deeley v. Dwight*, 132 N. Y. 59; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *McNeeley v. Welz*, 166 N. Y. 124; *National Bank of Deposit v. Rogers*, 166 N. Y. 380; *Farmers' L. & T. Co. v. Long Beach Improvement Co.*, 27 Hun 89; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815; *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342; *Anchor Brewing Co. v. Burns*, 32 App. Div. 272, 52 N. Y. Supp. 1005; *Denier v. Bonewur*, 134 App. Div. 577, 119 N. Y. Supp. 313; *Beebe v. Richmond L. H. & P. Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *Stewart v. Fidelity Loan Assoc.*, 19 Misc. 49, 42 N. Y. Supp. 705; *Brunswick-Balke-Collendar Co. v. Stephenson*, 4 N. Y. Supp. 123; *Otis v. Sill*, 8 Barb. 102; *Wood v. Lester*, 29 Barb. 145.

Corporate Mortgage.—A mortgage executed by a business corporation organized under the Act of 1875, upon its real and personal property, covers only such personalty as was in existence when the mortgage was given. *Beebe v. Richmond L. H. & P. Co.*, 13 Misc. 737, 35 N. Y. Supp. 1.

30. *McCaffrey v. Woodin*, 65 N. Y. 459; *Deeley v. Dwight*, 132 N. Y. 59;

Rochester Distilling Co. v. Rasey, 142 N. Y. 570; *National Bank of Deposit v. Rogers*, 166 N. Y. 380; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815; *Anchor Brewing Co. v. Burns*, 32 App. Div. 272, 52 N. Y. Supp. 1005; *Beebe v. Richmond L. H. & P. Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *Otis v. Sill*, 8 Barb. 102; *Wood v. Lister*, 29 Barb. 145. See *infra*, the subdivision *Operation as Equitable Lien*, p. 33.

31. *McCaffrey v. Woodin*, 65 N. Y. 459.

32. *Deeley v. Dwight*, 132 N. Y. 59.

33. *Denier v. Bonewur*, 134 App. Div. 577, 119 N. Y. Supp. 313. See also *infra*, the subdivision *Operation as Equitable Lien*, p. 33.

34. *Hart v. Taylor*, 82 N. Y. 373; *Deeley v. Dwight*, 132 N. Y. 59; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815.

Owner of real estate does not acquire such a title to an elevator sold by conditional sale so that he can give a mortgage thereon, where the materials for the elevator are on the premises but it is not yet constructed. *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930.

e. *Property Potentially in Existence.* — Property to be the subject of a mortgage need not actually exist in the possession of the mortgagor; it is sufficient if it potentially exists, and when the property changes from a potential to an actual existence, the title thereto passes to the mortgagee.³⁵ A person owns property "potentially" when it is the ordinary increase or growth of other property which he has; as fruit or grass from his farm, milk from his cow, wool from his sheep, wine from his vineyard, or the future offspring from a female animal.³⁶ Thus, the owner or tenant of a farm may mortgage the dairy products to be produced therefrom.³⁷ When ashes are the subject of a mortgage, it may properly provide that the lien thereof shall extend to potash to be manufactured therefrom, and in such a case, the lien attaches to the new article as fast as it is manufactured.³⁸

Where a construction company executed a mortgage conveying all property or rights of property acquired or to be acquired under a concession from a foreign government giving it the right to build a railroad and providing for the subsequent incorporation of a railroad company and for the issue of its securities, part of which were to be delivered to the construction company in payment for the work as it progressed, it was held that the mortgage covered the securities to be thereafter issued and delivered to the mortgagor.³⁹

Property is not potentially owned where the mortgagor has no possession of or interest in the agent of its production.⁴⁰ A

35. *Farmers' L. & T. Co. v. Long Beach Imp. Co.*, 27 Hun 89; *Betsinger v. Schuyler*, 46 Hun 349, 12 St. Rep. 377; *Van Vechten v. McKone*, 69 Hun 510, 23 N. Y. Supp. 428; *Conderman v. Smith*, 41 Barb. 404; *Cooper v. Douglass*, 44 Barb. 409.

36. *Page v. Larowe*, 22 N. Y. Supp. 1099, 51 St. Rep. 35; *Farmers' L. & T. Co. v. Long Beach Improvement Co.*, 27 Hun 89.

"To be potentially in existence, the property or right out of which it is to arise, grow or be created, must be legally in the possession of the person, as sown seed, when there is a sale or mortgage of future crops of

grass or grain; sheep, where there is a sale or mortgage of wool to be grown in the future, or cows, where there is a sale or mortgage of the increase. *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930.

37. *Betsinger v. Schuyler*, 46 Hun 349, 12 St. Rep. 377; *Conderman v. Smith*, 41 Barb. 404. See also *Van Vechten v. McKone*, 69 Hun 510, 23 N. Y. Supp. 428.

38. *Dunning v. Stearns*, 9 Barb. 630.

39. *Central Trust Co. v. West India Imp. Co.*, 169 N. Y. 314.

40. *Farmers' L. & T. Co. v. Long Beach Improvement Co.*, 27 Hun 89.

mortgage of the earnings of a mariner of new and distinct adventures, not begun or contemplated, does not give the assignee the legal title thereto or a legal lien thereon.⁴¹

f. *Crops.* — Crops not yet grown, but which grow spontaneously, the roots thereof being in the soil when the mortgage is given, are held to have such a potential existence that they may be mortgaged.⁴² If a person, who, by agreement with the owner of land, has a one-half interest in a fallow for the purpose of raising a crop of wheat, executes a chattel mortgage upon the fallow, the mortgage will bind the interest of the mortgagor in the fallow, and in the wheat afterwards put in under the agreement.⁴³

But a crop which is to be planted and raised in the future has no potential existence and is not the subject of a mortgage.⁴⁴ However, where a landlord reserves, in a lease of a

41. *Cooper v. Douglass*, 44 Barb. 409, wherein the court said: "The theory, as I understand it, upon which future earnings or the result of future labor are sometimes allowed to be anticipated and appropriated to the payment or security of a present indebtedness, is that they are connected with a contract or employment already in existence, or are the fruit of advances made or supplies furnished to carry on the business out of which the future property or earnings arise; and then the pledge attaches not to this property or these earnings, from the moment of the contract, but from the moment they spring into existence by virtue of the contract of the parties, that they shall do so. But I think this doctrine has not been carried, except in a few cases, which do not seem to be well considered, to such an extent as to embrace the result of labor undefined in character and unrestricted in time, which arise out of an employment having no connection with the nature or object of the indebtedness, and having in fact no real or contemplated existence at the time the contract is entered into."

42. *Jenks v. Smith*, 1 N. Y. 90; *McCaffrey v. Woodin*, 65 N. Y. 459; *Harder v. Plass*, 57 Hun 540, 11 N. Y. Supp. 226; *Rochester Distilling Co. v. Rasey*, 65 Hun 512, 20 N. Y. Supp. 583, *aff'd*, 142 N. Y. 570; *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342.

Hay is a perennial crop which has a potential existence. *Nestell v. Hewitt*, 19 Abb. N. C. 282.

Growing grass owned by a person other than the owner of the realty is personal property and may be mortgaged as such. *Davidson v. Osborne*, 75 Misc. 391, 135 N. Y. Supp. 675.

Wine Plants.—A mortgage of wine plants by a tenant is valid as between the parties and will enable the mortgagee, by foreclosure and sale, to acquire the mortgagor's right to remove them from the premises. *Wintermute v. Light*, 46 Barb. 278.

Effect of Chattel Mortgage on Crops.—See note to N. Y. Reports, Bender Ed., Book 13, p. 938.

43. *Shuart v. Taylor*, 7 How. Pr. 251.

44. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, *aff'd* 65 Hun 512, 20 N. Y. Supp. 583; *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342.

farm, a lien upon or title to growing crops as security for the rent, though such crops are not planted at the time of the execution of the lease, the legal title to the crops vests in the landlord when they come into actual existence.⁴⁵ Where a lessee, after the execution of a lease of a farm, but before the commencement of his term, gave a mortgage on grass to be cut therefrom during the term, it was held that the lessee had no potential ownership in the grass and the mortgage was not valid.⁴⁶

g. Operation as Equitable Lien.—A mortgage upon non-existing or after-acquired property, while not effective as a mortgage, operates, in some cases, as an equitable lien.⁴⁷ Where one of the lessees of premises executed a mortgage upon his interest in the lease and property to be placed on the premises, and thereafter the lessees transferred to another their rights under the lease, it was held that the mortgage operated as an equitable lien upon property subsequently placed on the premises by such lessees and that such lien was effective as against the transferees who had constructive knowledge thereof, but that such lien did not cover property subsequently placed on the premises by the transferees.⁴⁸ Where a lease of certain hotel property contained a clause: "A lien to be given by the said lessees to said lessors to secure the payment thereof (the rent) on all the furniture that

A chattel mortgage of potatoes not planted carries no title to the mortgagor. *Cressey v. Sabre*, 17 Hun 120.

As against creditors, a mortgage upon crops not yet planted is void, but, as to crops planted, it is valid if filed. *Rochester Distilling Co. v. Rasey*, 65 Hun 512, 20 N. Y. Supp. 583, *aff'd*, 142 N. Y. 570.

45. *Andrew v. Newcomb*, 32 N. Y. 417; *Booher v. Stewart*, 75 Hun 214, 27 N. Y. Supp. 114; *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342; *Nestell v. Hewitt*, 19 Abb. N. C. 282. Compare *Milliman v. Neher*, 20 Barb. 37.

Interest of Tenant.—Where the owner of a farm leases the same and

the contract provides that the ownership of the crops shall remain in the owner until the tenant pays the rent or gives security therefor, the title to the crops vests in the landlord as soon as the crops come into existence and the tenant has no interest therein which can be levied upon under an execution; the only interest of the tenant is the right to acquire the property when he performs the conditions. *Andrew v. Newcomb*, 32 N. Y. 417.

46. *Page v. Larowe*, 22 N. Y. Supp. 1099, 51 St. Rep. 35.

47. See *supra*, the subdivision *After-acquired Property*, p. 28; *Property Not in Existence*, p. 29.

48. *Kribbs v. Alford*, 120 N. Y. 512.

shall be placed in said hotel by said lessees," it was held that the clause did not create a lien, but was a covenant to do so, but that equity would decree a specific performance thereof.⁴⁹

Such equitable lien may be foreclosed by a suit in equity;⁵⁰ and if the mortgagor has disposed of the property, the mortgagee can impress his lien upon the avails thereof.⁵¹ But, at law, no lien upon or title to the mortgaged property passes to the mortgagee.⁵² The extent of the mortgagee's legal rights is a license to seize the property. Upon such seizure, legal title thereto is vested in the mortgagee.⁵³

49. *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

50. *Deeley v. Dwight*, 132 N. Y. 59.

Chose in Action.—A mortgage purporting to cover after-acquired property creates merely an equitable lien thereon; the mortgagee to subject the property to the lien of his mortgage must take physical possession thereof, if it is of a chattel nature, and, if it is a chose in action, he must commence a proceeding in equity to subject it to the lien. *Medina, etc., Light Co. v. Buffalo, etc., Safe Deposit Co.*, 119 App. Div. 245, 104 N. Y. Supp. 625.

Trust.—If a mortgage upon property to be acquired is valid as a contract to give a lien, it can be enforced only as a right under the contract, not as a trust attached to the property. *Otis v. Sill*, 8 Barb. 102.

51. *Hale v. Omaha Nat. Bank*, 49 N. Y. 626.

52. *Deeley v. Dwight*, 132 N. Y. 59; *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342.

53. *McCaffrey v. Woodin*, 65 N. Y. 459; *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342.

Legal Rights of Mortgagee.—Where a person gives to another a chattel mortgage upon a crop of grain to be planted in the future, not for the purpose of securing rent due to

the mortgagee, the mortgagee acquires thereby no legal title to the crop thereafter planted or raised by the mortgagor; the mortgage, however, confers on the mortgagee a license to take such crop, and if he seizes it before the sale thereof by the mortgagor, the title to such property then vests in him, but, if prior to any such seizure by the mortgagee the mortgagor sells the property, the mortgagee, never having had legal title thereto, cannot maintain an action for the conversion thereof. *Fleetham v. Reddick*, 82 Hun 390, 31 N. Y. Supp. 342.

Replevin.—Where a chattel mortgage provides that the mortgagor may sell the mortgaged property from time to time if he replace it with other goods of a similar kind and quantity, the mortgagee, upon the default of the mortgagor, cannot maintain an action to replevy the substituted property. *Denier v. Bone-wur*, 134 App. Div. 577, 119 N. Y. Supp. 313.

Equitable Defense.—Under our system of administering law and equity, an equitable defense may be set up in a legal action, and thus the mortgagee may, in certain cases, set up his equitable lien as a defense to an action at law. See *Anchor Brewing Co. v. Burns*, 32 App. Div. 272, 52 N. Y. Supp. 1005.

An equitable lien, in the absence of fraud, is valid as between the parties,⁵⁴ and third persons with knowledge thereof.⁵⁵ But, until the mortgagee seizes the property or does some act to make his lien effective, it is invalid as against creditors, or purchasers or mortgagees in good faith.⁵⁶ To be effective as against a subsequent purchaser or mortgagee, it is not essential that he have actual knowledge thereof; constructive notice, such as given by the proper filing of the mortgage, is sufficient.⁵⁷ The mortgage, if filed, is notice, though a search in the clerk's office fails to inform the searcher thereof.⁵⁸ A mortgage operating as an equitable lien is superior to a second mortgage expressly subject to the prior mortgage.⁵⁹

54. *Husted v. Ingraham*, 75 N. Y. 251; *Ludwig v. Kipp*, 20 Hun 265; *Kennedy v. National Union Bank of Watertown*, 23 Hun 494; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815.

55. *Kribbs v. Alford*, 120 N. Y. 519; *Wood v. Lester*, 29 Barb. 145; *Tilden v. Tilden*, 26 Misc. 672, 57 N. Y. Supp. 864.

56. *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *Farmers' L. & T. Co. v. Long Beach Improvement Co.*, 27 Hun 89; *Reynolds v. Ellis*, 34 Hun 47, *aff'd*, 103 N. Y. 115; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815; *Beebe v. Richmond L. H. & P. Co.*, 13 Misc. 737, 35 N. Y. Supp. 1; *Tilden v. Tilden*, 26 Misc. 672, 57 N. Y. Supp. 864; *Otis v. Sill*, 8 Barb. 102; *Cooper v. Douglas*, 44 Barb. 409.

Seizure.—Where the mortgagee, in a mortgage of subsequently acquired property, seizes the property before the rights of third parties intervene, he may hold the same as against the mortgagor or third parties. *McCaffrey v. Woodin*, 65 N. Y. 459; *Kennedy v. National Union Bank of Watertown*, 23 Hun 494; *Perkins v. Batterson*, 66 Hun 583, 21 N. Y. Supp. 815.

Creditors.—A mortgage cannot be

given future effect as a lien upon personal property, which, at the time of its delivery, was not in existence, actually or potentially when the rights of creditors have intervened. *Rochester Distilling Co. v. Rasey* 142 N. Y. 570; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203.

A bona fide purchaser of the property is entitled to hold the same discharged of the equitable lien. *Wood v. Lester*, 29 Barb. 145.

Action by Lienor against Subsequent Mortgagee.—An action cannot be maintained by one claiming a prior equitable lien upon personal property against a subsequent mortgagee on the theory that the defendant has so conducted himself in the exercise of his legal right of sale as unnecessarily to reduce the value of the plaintiff's lien, where it appears that the defendant has done nothing but exercise his legal right to foreclose his mortgage and sell the interest of the mortgagor in the property. *Hale v. Omaha National Bank*, 64 N. Y. 550.

57. *Kribbs v. Alford*, 120 N. Y. 519.

58. *Kribbs v. Alford*, 120 N. Y. 519.

59. *Stevens v. Watson*, 4 Abb. Dec. 302.

Sec. 3. Growing Trees.

A chattel mortgage upon nursery stock works a severance of the stock from the real estate and after default the absolute title vests in the mortgagee, who becomes entitled to enter upon the property and remove it with as little injury to the owner of the realty as possible.⁶⁰ But, it seems, that a mortgage upon growing trees does not work such a severance until default.⁶¹

Sec. 4. Fixtures.⁶²

Whether property upon which a mortgage is given is personalty and thus subject to a chattel mortgage or whether it is so annexed to the realty as to be subject only to a real estate mortgage often presents a difficult question.⁶³ Where a mortgage is given upon chattels prior to their annexation to the realty, they generally retain their character as personal property, such being deemed the intention of the parties.⁶⁴ But it has been held that

60. *Duffus v. Bangs*, 43 Hun 52, *aff'd*, 122 N. Y. 423.

61. *Bank of Lansingburgh v. Crary*, 1 Barb. 542.

62. **Fixtures.**—As to what constitute, see Wait's Law and Practice (7th ed.), vol. 1, p. 817.

63. **Looms in Woolen Factory.**—Where looms in a woolen factory, together with the factory, were conveyed by mortgage recorded only as a real estate mortgage, it was held that a creditor of the mortgagor could levy upon the looms, where they were connected with the motive power by leather bands but not otherwise annexed to the building than by screws holding them to the floor. *Murdock v. Gifford*, 18 N. Y. 28.

Hop poles used in the raising of hops upon a farm are covered by a mortgage of the land, whether they are upon the farm at the time of the giving of the mortgage or are subsequently brought thereon, and the lien of the mortgage upon them is superior to the title acquired by one who, with knowledge of the prior mortgage and

of the mortgagor's insolvency, takes a chattel mortgage upon the poles immediately after their removal from the farm, to secure himself from liability for prior indorsements made by him for the accommodation of the mortgagor. *Sullivan v. Toole*, 26 Hun 203.

Theatre chairs, secured to the floor of a theatre by screws 2½ inches in length, do not lose their character as personalty and may be the subject of a chattel mortgage. *Metropolitan Concert Co. v. Sperry*, 9 St. Rep. 342.

64. *Sisson v. Hibbard*, 75 N. Y. 542; *Kinsey v. Bailey*, 9 Hun 452.

Salt Kettles.—Where salt kettles were bought and mortgaged to the seller as personalty and then embedded in brick arches but could be removed therefrom without injury at an inconsiderable expense, it was held that they continued personalty as against a subsequent purchaser of the salt works, who had no actual notice of the facts. *Ford v. Cobb*. 20 N. Y. 344.

chattels may be so annexed to the realty that they lose their character as personalty. In such a case the remedy of the mortgagee is against the person who wrongfully converts the property into realty.⁶⁵

Under a lease providing that all alterations made by either party, except movable fixtures, shall be the property of the lessor, the holder of a chattel mortgage given by the lessee upon trade fixtures attached to the building has no lien thereon as against the lessor.⁶⁶

Sec. 5. Rolling Stock.

The rolling stock of a railroad is not a part of its realty, but retains its character as personal property, and may be the subject of a chattel mortgage.⁶⁷

Sec. 6. Chattels Real.

A lease of real estate for a term of years is termed a "chattel real."⁶⁸ It is personal property but is not a "chattel" within the meaning of the statutes relating to the filing of chattel mortgages and a mortgage thereon is not, therefore, required to be filed.⁶⁹

Sec. 7. Future Estate.

A mortgage upon a vested interest in personal property, not reducible to possession until the death of a third party, is valid as an equitable mortgage; such a mortgage need not be filed as a chattel mortgage.⁷⁰

65. *Voorhees v. McGinnis*, 48 N. Y. 282. Later cases, however, have cast doubt upon the authority of *Voorhees v. McGinnis*. See *Tifft v. Horton*, 53 N. Y. 377; *Kinsey v. Bailey*, 9 Hun 452.

66. *Excelsior Brewing Co. v. Smith*, 125 App. Div. 668, 110 N. Y. Supp. 8.

67. *Hoyle v. Plattsburgh & Montreal R. Co.*, 54 N. Y. 314; *Stevens v. Buffalo & N. Y. City R. Co.*, 31 Barb. 590, *overruling Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. 484.

68. *Real Property Law*, § 33.

69. *In re Fulton*, 153 Fed. 664; *State Trust Co. v. Casino Co.*, 19 App. Div. 344, 46 N. Y. Supp. 492. See also *State Trust Co. v. Casino Co.*, 5 App. Div. 381, 39 N. Y. Supp. 258; *Westchester Trust Co. v. Hobby Bottling Co.*, 102 App. Div. 464, 92 N. Y. Supp. 482, *aff'd*, 187 N. Y. 577, *mem.*

70. *Tilden v. Tilden*, 26 Misc. 672, 57 N. Y. Supp. 864.

Sec. 8. Stock of Goods.

A mortgage on a retail stock of goods is a questionable security. If there is an arrangement between the parties that the mortgagor may sell the goods for his own benefit, the mortgage is generally deemed fraudulent as to the creditors of the mortgagor.⁷¹ A procedure is now outlined by statute by which a lien may be imposed on a stock of goods.⁷²

Sec. 9. Vessels.

The validity and effect of mortgages on vessels is, in many respects, different from mortgages upon other property. A subsequent chapter of this work is devoted to such mortgages.⁷³

71. See *infra*, the subdivision *Reservation by Mortgagor of Disposal of Property*, p. 108.

72. Personal Property Law, § 45.

See *infra*, the chapter *Mortgage on Stock of Goods*, p. 186.

73. See *infra*, p. 189.

CHAPTER IV.

FORM AND VALIDITY.

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Sec. 1. In General.

No particular form is required to constitute a valid chattel mortgage.¹ An instrument in the form of a real estate mortgage,

1. McCaffrey *v.* Woodin, 65 N. Y. 552; Nestell *v.* Hewitt, 19 Abb. N. C. 459; Fitzgerald *v.* Atlanta Home Ins. 282. Co., 61 App. Div. 350, 70 N. Y. Supp.

including therein personal property, is deemed a chattel mortgage as to the personality.²

Sec. 2. Verbal Mortgage.

At common law, a verbal mortgage of chattels was valid though the mortgagor retained possession of the mortgaged property, the retention of possession, however, being considered a badge of fraud.³ As a mortgage is a sale (upon condition) it may be affected by the Statute of Frauds, if not in writing. An oral mortgage may also be affected by the statutes requiring the filing of mortgages.⁴ But, in many instances, mortgages are effective though not filed, and a mortgage of property worth less than \$50 is not avoided by the Statute of Frauds.⁵ Even where the value of the property exceeds \$50, if the mortgagee takes possession of the property, both the Statute of Frauds and the requirement of filing are satisfied and a verbal mortgage, under such circumstances is valid.⁶

Where a tenant agreed by parol, with his lessor, that he would turn out hay and grain to secure the payment of the rent reserved in the lease, if the lessor was afraid that she would not get her pay; the value of the property being over \$50, and nothing being paid, and no receipt or credit actually given, or possession delivered, it was held that the transaction rested in words merely, and no title to such property passed to the lessor.⁷

A mortgagee of chattels cannot obtain a lien upon other similar chattels, as against a subsequent purchaser thereof, through a verbal agreement between himself and his mortgagor to consider them substituted in the place of those described in the mortgage.⁸

2. *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552; holding that such an instrument is a chattel mortgage within the meaning of that term as used in New York standard fire insurance policy.

3. *Terwilliger v. Ontario, Carbon-dale, etc.*, R. Co., 149 N. Y. 86.

4. *Ceas v Bramley*, 18 Hun 187.

5. *Bank of Rochester v. Jones*, 4 N. Y. 497; *Terwilliger v. Ontario*,

Carbondale, etc., R. Co., 149 N. Y. 86.

6. *Bank of Rochester v. Jones*, 4 N. Y. 497; *Bardwell v. Roberts*, 66 Barb. 433. See also *Ackley v. Finch*, 7 Cow. 290; *Ferguson v. Union Furnace Co.*, 9 Wend. 345.

7. *Buskirk v. Cleveland*, 41 Barb. 610.

8. *Powers v. Freeman*, 2 Lans. 127.

Sec. 3. Parties.

a. *In General.* — All parties who are legally competent to make other valid contracts may make chattel mortgages.

It is usual in a chattel mortgage to describe the parties by name and residence. The place of residence of the mortgagor controls the place of filing the mortgage, but the recital in the mortgage of his residence is of no importance. His correct residence may be shown when the filing of the mortgage is questioned.⁹

The insertion in the body of a chattel mortgage, through the mistake of the scrivener, of the name of one person, as mortgagee, instead of another, as was intended by the parties, does not affect the validity of the mortgage as between the mortgagor and the person actually intended.¹⁰

b. *Infants.* — A chattel mortgage executed by an infant upon personal property owned by him is voidable, not void. He may, at his option, avoid the same at any time before he becomes of age or within a reasonable time thereafter. This result is accomplished by any act which manifests such a purpose, such as an unconditional sale and delivery of the property to a third person.¹¹ Thus, where an infant executes a chattel mortgage upon a chattel owned by him and on the same day sells and delivers the property to a purchaser, the title of the purchaser is superior to that of the mortgagee, unless the sale is also avoided by the infant.¹²

c. *Partnership.* — One of two or more partners may, in the absence of fraud, execute a chattel mortgage upon firm property for the payment of a firm debt.¹³ But it seems that a mort-

9. *Chandler v. Bunn, Hill & D.* Supp. 167.

10. *Croft v. Brandow*, 61 App. Div. 247, 70 N. Y. Supp. 364.

11. *Chapin v. Shafer*, 49 N. Y. 407.

12. *Chapin v. Shafer*, 49 N. Y. 407.

13. *Mablett v. White*, 12 N. Y. 454; *Schwarzschild & S. Co. v. Matthews*, 39 App. Div. 477, 57 N. Y. Supp. 338; *McClelland v. Remsen*, 3 Abb. Dec. 74, 5 Abb. Pr., N. S., 250.

Transfer of Firm Property. — In the absence of fraud, one member of a firm may, notwithstanding the protest of his partner, transfer all the property of the partnership, in consideration of the promise of the purchaser to pay its debts, though not yet due. *Graser v. Stellwagen*, 25 N. Y. 315.

Subsequent Ratification. — Where one partner executes a chattel mortgage of partnership property and the other subsequently ratifies the mort-

gage given by one partner after dissolution does not transfer the legal title to the firm property.¹⁴

Where a mortgage is given by a partnership to secure future advances, it does not secure advances made after the dissolution of the partnership to the successors thereof.¹⁵

d. *Joint Owners of Property.*—One of two or more joint owners of personal property may mortgage his interest therein without the consent, concurrence or knowledge of the other.¹⁶ Where the mortgagee of the interest of one tenant in common causes the whole chattel to be sold by virtue of his mortgage, one who purchases and takes possession of the chattel at such sale, with notice of the rights of the other tenant in common thereof, is liable to the latter for the conversion of his interest therein.¹⁷

e. *Joint Mortgagees.*—Upon default in a chattel mortgage given to several mortgagees to secure the payment of several debts, the mortgagees become tenants in common of the property. One of such tenants has no right to sell the entire property.¹⁸ Where the joint mortgagees are not partners, one cannot make any agreement with the mortgagor which will affect the rights of the other. Thus, an arrangement between the mortgagor and one of the mortgagees that the mortgagor may retain possession after default in the payment of an installment does not preclude the other mortgagee from taking possession of the property under the danger clause.¹⁹ Where a chattel mortgage appears by its terms to have been given as security to a second indorser of notes, it may be shown by parol that it was intended as security for all the indorsers on the notes and, upon such proof being made, it can be enforced by another indorser.²⁰

Sec. 4. Corporate Mortgages.

a. *Statute.*—Section 6 of the Stock Corporation Law provides for mortgages given by stock corporations. Such statute

gage, the latter cannot claim that it was not effectual to transfer the legal title to the property scheduled. *Kennedy v. National Union Bank of Watertown*, 23 Hun 494.

14. *Husted v. Ingraham*, 75 N. Y. 251.

15. *Monnot v. Ibert*, 33 Barb. 24.

16. *Harris v. Wessels*, 5 Hun 645.

17. *Van Doren v. Balty*, 11 Hun 239.

18. *Tyler v. Taylor*, 8 Barb. 585.

19. *Hanrahan v. Roche*, 22 Alb. L. J. 134.

20. *Bainbridge v. Richmond*, 17 Hun 391, *aff'd*, 78 N. Y. 618, *mem.*

applies to chattel as well as real estate mortgages.²¹ Its provisions are as follows: "In addition to the powers conferred by the general corporation law, every stock corporation shall have the power to borrow money and contract debts, when necessary for the transaction of its business, or for the exercise of its corporate rights, privileges or franchises, or for any other lawful purpose of its incorporation; and it may issue and dispose of its obligations for any amount so borrowed, and may mortgage its property and franchises to secure the payment of such obligations, or of any debt contracted for said purposes. Every such mortgage, except purchase-money mortgages and mortgages authorized by contracts made prior to May first, eighteen hundred and ninety-one, shall be consented to by the holders of not less than two-thirds of the capital stock of the corporation, which consent shall be given either in writing or by vote at a special meeting of the stockholders called for that purpose, upon the same notice as that required for the annual meetings of the corporation; and a certificate under the seal of the corporation that such consent was given by the stockholders in writing, or that it was given by vote at a meeting as aforesaid, shall be subscribed and acknowledged by the president or a vice-president and by the secretary or an assistant secretary, of the corporation, and shall be filed and recorded in the office of the clerk or register of the county wherein the corporation has its principal place of business. When authorized by like consent, the directors under such regulations as they may adopt, may confer on the holder of any debt or obligation, whether secured or unsecured, evidenced by bonds of the corporation, the right to convert the principal thereof, after two and not more than twelve years from the date of such bonds, into stock of the corporation; and if the capital stock shall not be sufficient to meet the conversion when made, the directors shall from time to time, authorize an increase of capital stock sufficient for that purpose by causing to be filed in the office of the secretary of state, and a duplicate thereof in the office of the clerk of the county where the principal place of business of the corporation shall be located, a certificate under the seal of the corporation,

21. New York Security & Trust Co. v. Saratoga Gas & Light Co., 88 Hun 569, 34 N. Y. Supp. 890.

subscribed and acknowledged by the president and secretary of the corporation setting forth,

1. A copy of such mortgage; or resolution of directors authorizing the issue of such bonds;
2. That the holders of not less than two-thirds of the capital stock of the corporation duly consented to the execution of such mortgage or resolution of directors authorizing the issue of such bonds by such corporation;
3. A copy of the resolution of the directors of the corporation authorizing the increase of the capital stock of the corporation necessary for the purpose of such conversion;
4. The amount of capital theretofore authorized, the proportion thereof actually issued and the amount of the increased capital stock.

If the corporation be a railroad corporation the certificate shall have indorsed thereon the approval of the public service commission having jurisdiction thereof. When the certificate herein provided for has been filed, the capital stock of such corporation shall be increased to the amount specified in such certificate."

b. *Consents.*—A consent to mortgage the real and personal property of a stock corporation does not authorize a mortgage of its corporate franchise. Where, however, the realty and personality of a corporation are mortgaged, together with its franchise, though consent has not been procured as to the franchise, the mortgage will be deemed valid as to the real and personal property as to which the consent was given, but inoperative as to the mortgage of the franchise.²² The consent of stockholders is not required for a purchase money mortgage.²³

c. *Who May Attack for Failure to Comply with Statute.*—A mortgage upon corporate chattels, not executed in conformity with section 6 of the Stock Corporation Law, is invalid.²⁴ This section seems to have been enacted primarily for the benefit of the stockholders.²⁵ But in order to take advantage of the invalid-

22. *Lord v. Yonkers Fuel Gas Co.*, 99 N. Y. 551. *Stable Co.*, 140 App. Div. 495, 125 N. Y. Supp. 410.

23. *Clement v. Congress Hall*, 72 Misc. 519, 132 N. Y. Supp. 16. 25. See *In re New York Economical Printing Co.*, 110 Fed. 514.

24. *London Realty Co. v. Coleman*

ity of the mortgage it is not necessary that the objection should be raised by a stockholder or creditor; the defense is available to the corporation itself. The corporation is not estopped from asserting the defense on the theory that it cannot take advantage of its own wrong, or because it did not offer to return the consideration for the mortgage, where it does not appear that any consideration whatever was received by it.²⁶ A general creditor of the corporation cannot attack a chattel mortgage executed by it on the ground that it was not executed as required by the statute.²⁷ Where a mortgagee of a joint stock association sued to recover the mortgaged chattels from a third person, it was held that the defendant could not defend on the ground that the consent of two-thirds of the stockholders had not been obtained, where the defendant did not claim to be a judgment creditor or a subsequent purchaser or mortgagee in good faith.²⁸

d. *Corporate Mortgage Operating as Preference.* — A domestic stock corporation which is insolvent is prohibited by statute from executing a mortgage with intent thereby to give a preference.²⁹ This statute applies to domestic, not to foreign corporations.³⁰

e. *Mortgage by Railroad.* — Subject to certain limitations and requirements, every railroad corporation has power, "From time to time to borrow such sums of money as may be necessary for completing and finishing or operating or improving its railroad, or for any other of its lawful purposes and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its property and franchises to secure the payment of any debts contracted by the company for the purposes aforesaid, notwithstanding any limitation on such power contained in any general or special law. But no mortgage, except purchase-money mortgages, shall be issued by any railroad corporation under this chapter or any other law without the consent of the public service commission, and the consent of the stockholders owning at least

26. *London Realty Co. v. Coleman Stable Co.*, 140 App. Div. 495, 125 N. Y. Supp. 410. But see *State Bank of Williamson v. Fish*, 120 N. Y. Supp. 365, holding that where no stockholder objects, a trustee in bankruptcy cannot.

27. *Glover v. Ehrlich*, 62 Misc. 245, 114 N. Y. Supp. 992.

28. *Nelson v. Drake*, 14 Hun 465.

29. *Stock Corporation Law*, § 66.

30. *Coats v. Donnell*, 94 N. Y. 168.

two-thirds of the stock of the corporation, which consent shall be in writing, and shall be given and certified and be filed and recorded in the office of the clerk or register of the county where it has its principal place of business, as provided in section six of the stock corporation law; or else the consent of the public service commission and the consent by their votes of stockholders owning at least two-thirds of the stock of the corporation which is represented and voted upon in person or by proxy at a meeting called for that purpose upon a notice stating the time, place and object of the meeting, served at least three weeks previously upon each stockholder personally, or mailed to him at his post-office address, and also published at least once a week for three weeks successively in some newspaper printed in the city, town or county where such corporation has its principal office, and a certificate of the vote at such meeting shall be signed and sworn to and shall be filed and recorded as provided by section six of the stock corporation law. When authorized by the stockholders' consent to any bonds made or issued under this section, the directors, under such regulations as they may adopt, may confer on the holder of any such bonds the right to convert the principal thereof, after two and not more than twelve years from the date of the bond, into stock of the corporation at a price fixed by the board of directors, which may be either par or a price not less than the market value thereof at the date of such consent to such bonds; and if the capital stock shall not be sufficient to meet the conversion when made, the board of directors shall authorize an increase of capital stock sufficient for that purpose.”³¹

A mortgage given under this statute covers after-acquired property.³² Though a railroad company may have exceeded its powers in purchasing canal boats, it cannot defeat the title of its mortgagee, on the ground that the purchase was *ultra vires*; nor can the mortgagee, who has sold the boats under the mortgage, excuse himself from crediting the proceeds, on that ground.³³

31. Railroad Law, § 8, subd. 10.

The rolling stock of a railroad may be the subject of a chattel mortgage. See *infra*, the subdivision *Rolling Stock*, p. 37.

32. *Platt v. New York & Sea Beach R. Co.*, 9 App. Div. 87, 41 N. Y. Supp.

42. See also *supra*, the subdivision *After-acquired Property*, p. 28.

33. *Parish v. Wheeler*, 22 N. Y. 494.

f. Filing of Corporate Mortgage. — The requirements for the filing and refiling of certain corporate mortgages are in many respects different from those relating to mortgages executed by individuals. The questions relating to the filing and refiling of such mortgages are discussed in other chapters.³⁴

Sec. 5. Debt.

a. In General. — The debt secured by a chattel mortgage is the principal subject of the transaction; the mortgage is but an incident thereto deriving its whole legal effect from the existence of the debt.³⁵ While there must be some consideration for a chattel mortgage,³⁶ it is not essential that a debt exist independently of the mortgage. The parties may confine the remedy of the mortgagee strictly to the mortgage.³⁷ The debt may be owed by one person and the mortgage be given by another.³⁸ A chattel mortgage need not be given for a definite sum, but may merely secure the indebtedness of a third person “now owing.”³⁹ A recital in a mortgage of the existence of a debt is *prima facie* evidence thereof, and this is so although the mortgage is not properly renewed.⁴⁰

b. Future Advances. — A mortgage given to secure future advances is not fraudulent or void.⁴¹ It is valid though not

34. See *infra*, the chapters *Filing*, p. 58, and *Refiling*, p. 91.

35. *Thompson v. Van Vechten*, 27 N. Y. 568.

36. See *Look v. Comstock*, 15 Wend. 244.

Prior Mortgage Sufficient Consideration. — Where a first mortgage contains a provision that if it shall prove ineffectual for the purposes intended, a second shall be executed in its place, the consideration of the first is sufficient to support a second made in pursuance of such provision. *Hinks v. Field*, 14 N. Y. Supp. 247, 37 St. Rep. 724, *aff'd*, 129 N. Y. 633, *mem.*

No Consideration. — Where, pursuant to a contract between an employer

and the members of a labor union a chattel mortgage was given to a third party to secure a certain sum fixed as liquidated damages for a breach of the contract, such third party cannot enforce the chattel mortgage as it was without consideration as to him. *Flannell v. O'Brien*, 43 App. Div. 534, 60 N. Y. Supp. 101.

37. *Matthews v. Sheehan*, 69 N. Y. 585; *Blake v. Corbett*, 120 N. Y. 327. See *infra*, the subdivision *Action to Recover Debt*, p. 146.

38. *Blake v. Corbett*, 120 N. Y. 327.

39. *Blake v. Corbett*, 120 N. Y. 327.

40. *Kane v. Stark*, 15 Week. Dig. 509.

41. *Brown v. Guthrie*, 110 N. Y. 435.

operative, as a general rule, until the advances are made. In the meantime, the property is exposed to the claims of third parties.⁴²

Frequently mortgages are given to secure both a present indebtedness and advances to be subsequently made. Such a mortgage is not fraudulent and may be enforced for the amount actually due.⁴³ When free from fraud, it is valid, not only as between the parties, but as against creditors and other third parties.⁴⁴ But is valid only to the extent of advances made in good faith before a creditor or other third party acquires a subsequent title to or lien upon the property.⁴⁵ It has been held that a mortgage for future advances or liabilities will cover such only to the amount specified in the mortgage.⁴⁶ It is not necessary, however, that any amount be specified in such a mortgage.⁴⁷

Parol evidence is admissible to show the purpose and intent with which a chattel mortgage was executed, and, though, upon its face, it appears to be for the payment of a specified sum of money, it may be shown that its purpose was security for future advances or liabilities.⁴⁸ Thus, where the consideration stated in a mortgage was a present absolute indebtedness of \$1,000, and no such indebtedness existed, the mortgage was sustained, as against creditors of the mortgagor, by showing that the consideration of the mortgage was the indorsement by the mortgagee of the mortgagor's note for \$1,000 for the accommodation of the latter, and, upon his failure to raise money thereon, two notes

42. Brown v. Guthrie, 110 N. Y. 435.

Existence of Liability.—To give a chattel mortgage for future advances a lien on the property as against a *bona fide* purchaser or one holding the position of a judgment creditor, proof of the existence of an outstanding liability of the kind mentioned in the condition is necessary. *Marsh v. Kinney*, 11 *Week. Dig.* 144.

Advances Made to Successors of Firm.—Where a mortgage is given by a partnership to secure future advances, it cannot be made effectual to protect advances made or liabilities incurred for their successors, after a dissolution of the firm. *Monnot v. Ibert*, 33 *Barb. 24.*

43. Miller v. Lockwood, 32 N. Y. 293; Westcott v. Gunn, 4 *Duer* 107; Fairbanks v. Bloomfield, 5 *Duer* 434; Carpenter v. Blate, 1 *E. D. Smith* 491; Walker v. Snediker, Hoff. Ch. 145; Hendricks v. Robinson, 2 *Johns. Ch.* 283. See also *Burrit v. Sheffer*, 13 N. Y. Supp. 849, 37 *St. Rep.* 591.

44. Brown v. Kiefer, 71 N. Y. 610.

45. Carpenter v. Blate, 1 *E. D. Smith* 491. See also *Craig v. Tappin, 2 Sandf. Ch. 78.*

46. Mounot v. Ibert, 33 *Barb. 24.*

47. Miller v. Lockwood, 32 N. Y. 293.

48. McKinster v. Babcock, 26 N. Y. 378.

for \$500 were substituted which the mortgagee also indorsed, and by showing that the purpose of the mortgage was to secure any substituted liabilities.⁴⁹

c. *Inaccurate Statement of Debt.* — A mortgage is not necessarily fraudulent and void because the indebtedness is overstated. The mortgage is good for the amount actually due unless there is actual fraud in the transaction.⁵⁰ But it is always advisable to state fairly and plainly the true consideration of the mortgage, for a failure to do so renders the mortgage open to suspicion.⁵¹ If the parties are guilty of fraud the mortgage is not valid, even to the extent of the just indebtedness.⁵² This question of fraud is further treated in another place in the work in connection with the discussion of fraudulent mortgages.⁵³

d. *Parol Evidence to Explain.* — Between the parties to a chattel mortgage, it generally cannot be varied or contradicted by parol evidence. If a mistake has been made in the mortgage as to the indebtedness of the mortgagor, the remedy is a reformation in a court of equity.⁵⁴ Parol evidence is admissible, in some cases, as where the mortgage is ambiguous.⁵⁵ The admissibility of parol evidence to show that a chattel mortgage was given to secure future advances is discussed in another section.⁵⁶

Sec. 6. Description of Property.

a. *In General.* — Considerable care must be observed in correctly describing the chattels covered by the mortgage. Only

Earlier Cases. — In *Divver v. McLaughlin*, 2 Wend. 596, it was held that, where nothing appears in the mortgage to show that it was intended as a security for advances to be made, the mortgage is no security for future advances made upon the strength of a parol arrangement. In *Walker v. Snediker*, Hoff. Ch. 145, the court said: "It has been settled in equity by repeated decisions, that a mortgage to secure future as well as present responsibilities is good. But the better opinion, if not the decided law, is, that the mortgage must express the object. It is certain that it cannot be rendered available for future liabilities by a subsequent parol agreement."

49. *McKinster v. Babcock*, 26 N. Y. 378.

50. *Miller v. Lockwood*, 32 N. Y. 293; *Frost v. Warren*, 42 N. Y. 204; *Marsden v. Cornell*, 62 N. Y. 215.

51. *McKinster v. Babcock*, 26 N. Y. 378.

52. *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159.

53. See *infra*, the subdivision *Excessive Statement of Indebtedness*, p. 121.

54. *Patchin v. Pierce*, 12 Wend. 61.

55. See *Dodge v. Potter*, 18 Barb. 193; *Ripley v. Larmouth*, 56 Barb. 21. See also *Wait's Law and Practice* (7th ed.), vol. 2, p. 772; *Chamberlayne's Modern Law of Evidence*.

56. See *supra*, the subdivision *Future Advances*, p. 47.

such property as is mentioned in the mortgage is transferred thereby. Property to be subsequently acquired or produced by the mortgagor will not be subject to the mortgage unless the mortgage refers to such property.⁵⁷ Where a lease of a farm reserved to the landlord a lien on butter, cheese and grain to be produced, it was held that hay was not subject to the mortgage.⁵⁸ Where a mortgage of a sugar refinery, and a chattel mortgage given at the same time, included all the machinery and effects therein but did not specifically include the sugars and syrups, it was held that the chattel mortgage did not cover such sugars and syrups.⁵⁹ Where a mortgage was given on "the entire stock in trade of every name and nature, now in the store No. 379 Broadway," it was held that the notes and debts due the mortgagors were not subject to the mortgage.⁶⁰

b. *Indefinite.* — As a general rule, the description will suffice if it enables third persons to identify the property when aided by the inquiries which the mortgage indicates.⁶¹

Where a lease of a hotel contained a provision that the lessee mortgaged to the lessor all of his chattels upon the premises, "an inventory whereof is to be made and annexed," it was held that the security was good though no inventory was actually annexed to the instrument.⁶² Where a mortgage covered "all the drygoods, boots and shoes, millinery goods, and gentlemen's furnishing goods, and stock in trade, then in the store occupied by" the mortgagors, it was held that the description, though gen-

57. *Van Vechten v. McKone*, 69 Hun 510, 23 N. Y. Supp. 428.

Mortgage Not Covering After-acquired Property. — A chattel mortgage covering goods and fixtures "herein extant in said shop No. 383 Lafayette street" does not cover after-acquired property. *Ferraro v. Stramello*, 134 N. Y. Supp. 535.

Purchase Money Mortgage. — One who gives a purchase money mortgage cannot defeat the lien on the ground that he selected the chattels from samples and that those delivered were not the chattels purchased. *Wallace v. Leoni*, 104 N. Y. Supp. 392.

58. *Briggs v. Austin*, 8 N. Y. Supp. 786, 29 St. Rep. 245.

59. *Thurber v. Minturn*, 18 Week. Dig. 25.

60. *Kemp v. Cornley*, 3 Duer 1.

61. *Van Vechten v. McKone*, 69 Hun 510, 23 N. Y. Supp. 428; *Matthews v. Sniffen*, 10 Daly 200.

A description is sufficient as against strangers or creditors, if it gives notice of the property intended to be conveyed. *Dunning v. Stearns*, 9 Barb. 630.

62. *Van Heusen v. Radcliff*, 17 N. Y. 580.

eral, could be rendered sufficiently definite by evidence of the facts as to the goods in the store at the time and that the mortgage would convey whatever, in fact, answered to the description.⁶³ Where a mortgage covered certain stone and the mortgagor's goods in his store, the description, after fully pointing out the stone mortgaged, proceeding: "and all other stones belonging to me, and all other goods and chattels, now in my store, &c., all in the town of Saugerties," it was held that it was sufficient to embrace all the goods of the mortgagor in the store at the time.⁶⁴ Where the property mortgaged was described as "— bushels of ashes now in the ashery in the possession of" the mortgagor, it was held that the mortgage was valid and that parol evidence was admissible to show the "quantity intended to be conveyed."⁶⁵

A chattel mortgage describing all the property of the mortgagor of certain kinds "now being and remaining" in his possession is sufficient.⁶⁶ The following description has been held sufficient: "The undivided one-half part of, in and to all of the fixtures, furniture and personal property located in or upon the premises, or now, or heretofore used in connection with the hotel known as Congress Hall, and the premises above described, which fixtures and personal property were owned by Clement and Cox in common."⁶⁷

On the other hand, it has been held that an instrument describing the mortgaged property as "ten of my carriage horses now in my possession in my stable 163 and 165 West 132d St." does not sufficiently describe the property so as to be valid as against a creditor levying upon the same.⁶⁸ Where a mortgage covered "all personal property whatever" owned by the mortgagors and "all growing crops of all kinds," it was held that the mortgage was too indefinite to cover rents of the premises.⁶⁹ Where a mortgage covered not only the scythes, iron, steel and coal then owned by the mortgagors, but also "all scythes, iron, steel and coal which may be purchased in lieu of the aforesaid

63. *Conkling v. Shelley*, 28 N. Y. 360.

67. *Clement v. Congress Hall*, 72 Misc. 519, 132 N. Y. Supp. 16.

64. *Russell v. Winne*, 37 N. Y. 591.

68. *McDonald v. City Trust, Safe Deposit and Surety Co.*, 32 Misc. 644, 66 N. Y. Supp. 475.

65. *Dunning v. Stearns*, 9 Barb. 630.

69. *Riley v. Sexton*, 32 Hun 245.

66. *In re Beebe*, 126 Fed. 853.

property," it was held that it was, as to property to be subsequently acquired, void for uncertainty.⁷⁰ Likewise, where a lease provided that the lessor should have a lien, as security for the rent, upon all the goods, wares, chattels, implements, fixtures, tools and other personal property which were or might be put on the demised premises it was held that it was void for uncertainty.⁷¹

c. *Schedule.* — A mortgage and a schedule accompanying the same are to be read together,⁷² though, it may be that, if there is an actual conflict between the body of the mortgage and an annexed schedule, the mortgage will control.⁷³

Where a chattel mortgage described certain property as "all machinery, tools, implements, appliances and personal property, and all other goods and chattels mentioned in the schedule hereto annexed, and now in the buildings and on the premises situated in the town of Cornwall, county and State aforesaid," and the schedule, which contained a minute list of articles, stated that it was an "inventory of personal property mentioned and referred to in the annexed mortgage," it was held that the general words of the mortgage were to be limited and restricted to the articles mentioned in the schedule, and that the mortgage did not cover other articles which were in the buildings and premises referred to in the mortgage.⁷⁴

A mortgage covering "all the glassware and other goods mentioned in the schedules hereunto annexed," does not include glassware not mentioned in the schedule.^{74a}

d. *Parol Evidence to Explain.* — Where the description of the mortgaged chattels is ambiguous, parol evidence is sometimes admissible to identify the property intended to be covered by the mortgage.⁷⁵ Thus, where a chattel mortgage described, among other property mortgaged, "one four-horse post coach called 'Steuben' and another called 'Mayday' at Hornellsville employed in staging," and it appeared that the mortgagor at the time the mortgage was executed, owned and possessed only two four-horse coaches, one called "Conhocton" and the other called "Mayday" and that there was no coach called "Steuben" at

70. *Otis v. Sill*, 8 Barb. 102.

74. *Broadhead v. Smith*, 55 Hun 499, 8 N. Y. Supp. 760.

71. *Buskirk v. Cleveland*, 41 Barb. 610.

74a. *J. & M. Haffen Brewing Co.*, 78 Misc. 366, 138 N. Y. Supp. 426.

72. *Edgell v. Hart*, 9 N. Y. 213; *Broadhead v. Smith*, 55 Hun 499, 8 N. Y. Supp. 760.

75. *Galen v. Brown*, 22 N. Y. 37; *Conkling v. Shelly*, 28 N. Y. 360; *Dunning v. Stearns*, 9 Barb. 630; *Dodge v. Potter*, 18 Barb. 193.

73. *Matthews v. Sniffen*, 10 Daly 200.

Hornellsville or employed there in staging, it was held that parol evidence was admissible to show that the coach "Conhocton" was intended to be included in the mortgage instead of the "Steuben."⁷⁸ And where a mortgage described the property as 11,000 feet of pine lumber in a certain shop, and it appeared that there was not over 2,000 feet of lumber in such shop at the time the mortgage was executed, it was held that parol evidence was admissible to show that other lumber owned by the mortgagor was intended to be covered by the mortgage.⁷⁷

Sec. 7. Validity of Mortgage.

a. *In General.* — Many questions concerning the validity of mortgages are discussed in other places. Thus, the effect of a failure to file,⁷⁸ or refile,⁷⁹ a chattel mortgage, is discussed in separate chapters of this work. A chapter is also devoted to fraudulent mortgages.⁸⁰

b. *By What Law Determined.* — As a general rule, a contract valid where executed and to be performed is valid everywhere, and a lien valid in the State where created is enforceable in all States where the property thereafter comes.⁸¹ Thus, a mortgage upon railroad property executed in Connecticut by a Connecticut railroad company is valid if filed according to the Connecticut law and need not be filed in this State, though some of its property is here situated, where it is not shown that the mortgaged property was in this State at the time of the execution of the mortgage.⁸² The validity of a mortgage on a vessel is to be governed by the law of the State where the vessel was registered, the mortgage made, and the parties resided.⁸³ If the mortgagor temporarily takes the mortgaged property into another State, where it is seized and sold under an execution against the mortgagor issued upon a judgment there recovered, in an action by the mortgagee against the constable for the conversion of the property, the nature, construction, obligation and effect of the

76. *Dodge v. Potter*, 18 Barb. 193.

77. *Galen v. Brown*, 22 N. Y. 37.

78. See *infra*, p. 58.

79. See *infra*, p. 91.

80. See *infra*, p. 106.

81. *Nichols v. Mase*, 25 Hun 640,

aff'd, 94 N. Y. 160.

82. *Nichols v. Mase*, 94 N. Y. 160.

83. *Watson v. Campbell*, 38 N. Y.

153.

mortgage are to be determined by the law of this State.⁸⁴ Where the mortgagor converted the mortgaged property after default and removed it to Canada, where it was sold under such circumstances that by the Canadian law the purchaser acquired a good title, it was held that the transaction was governed by our law, and the mortgagor recovered against the purchaser.⁸⁵ A chattel mortgage valid where executed and where it is to be performed, will not be deemed usurious because it offends the usury law of another State though the mortgaged property is in such State.⁸⁶

But where the law and policy of the State where the property is located have provided a different rule for its transfer, such rule is binding.⁸⁷ And where a creditor of the State where the property is located has levied upon property of his debtor, his rights will not be inferior to a chattel mortgage made and to be performed in another State, which is valid in such State, but invalid in the State where the property is located.⁸⁸ Thus, where the owner of property who lived in New York State executed a chattel mortgage upon property then located in Illinois, but within two days thereafter and before the mortgagee could cause the mortgage to be filed in Illinois, a creditor of the mortgagor attached the property and subsequently sold the same, it was held by the courts of this State, in an action by the mortgagee against the creditor for conversion, that the mortgagee could recover as the transaction was governed by the law of this State. But the Supreme Court of the United States held that this was error, that, as the attachment was valid by the law of Illinois, it was valid in this State, and that the transactions were to be governed by the law of Illinois.⁸⁹

c. *Usurious Mortgage.* — A chattel mortgage to secure a usurious loan is void.⁹⁰ If the mortgagee takes the goods under the

84. *Martin v. Hill*, 12 Barb. 631.

89. *Green v. Van Buskirk*, 74 U. S.

85. *Edgerly v. Bush*, 81 N. Y. 199,

139.

rev'g 16 Hun 80.

90. *Leslie v. Hoffman*, 1 Edm. Sel.

339. *Whitman v. Conner*, 8 J. & S.

Cas. 475.

86. *Keller v. Paine*, 107 N. Y. 83.

Transaction Held Usurious. —

87. *Dearing v. McKinnon Dash &*

Where, in an action upon certain

Hdwe. Co., 165 N. Y. 78; *Greene v.*

notes, it appeared that the plaintiff

VanBuskirk, 74 U. S. 139. See also

had agreed to lend one Green money

Whitman v. Conner, 8 J. & S. 339.

at 10 per cent. interest on his giving

to the plaintiff the defendant's note

mortgage, the mortgagor can recover the same or their value.⁹¹ If the mortgagee proceeds to foreclose the usurious mortgage, an injunction will lie for the restraint thereof.⁹²

While the defense of usury is personal, in that a mere stranger cannot attack the mortgage upon that ground,⁹³ any person having a lien upon the property may assert the invalidity.⁹⁴ An execution creditor of the mortgagor may assail the mortgage for usury.⁹⁵ In an action by a mortgagee against a sheriff for the conversion of the goods, the sheriff may show the usurious character of the transaction.⁹⁶ But the mortgagor, after selling the property to a third person, cannot sustain an action to cancel the mortgage and the notes secured thereby and to enjoin a sale in enforcement thereof, on the ground of usury; nor can a purchaser of the property expressly subject to the mortgage avoid the mortgage on such ground.⁹⁷

d. *Mortgage to Compound Crime.* — A chattel mortgage is void where it is given and received in compromise of a felony. And where persons knowingly advance means to aid the accused to compromise the offense, and are present and assist in the negotiation, a mortgage taken by them based upon such consideration is void. But where the assignee of such a mortgage takes the mortgaged property, and the mortgagors are not connected therewith, they are not liable.⁹⁸

e. *Delivery of mortgage.* — A mortgage has no validity until a delivery thereof is made.^{99a} If the attorney for creditors receives

for the amount, and Green then exchanged notes with the defendant giving him a chattel mortgage as security and borrowed the money from the plaintiff at 10 per cent. interest on the security of the defendant's note, it was held that the transaction was usurious. *Blodgett v. Wadhams, Hill & D.* Supp. 65.

91. *Ackley v. Finch*, 7 Cow. 290; *Leslie v. Hoffman*, 1 Edm. Sel. Cas. 475.

The mortgagee is liable to the mortgagor for the conversion of the property where he pretended to assign the mortgage to a third party who,

acting as the agent of the original mortgagee, seized the mortgaged property together with property not included in the mortgage. *Burghen v. Purdy*, 27 App. Div. 460, 50 N. Y. Supp. 546.

92. *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056; *Ehr-gott v. Forgetston*, 17 N. Y. Supp. 381, 43 St. Rep. 60.

93. *Cavan v. Kelly*, 3 Alb. L. J. 373.

94. *Thompson v. Van Vechten*, 27 N. Y. 568.

95. *Cavan v. Kelly*, 3 Alb. L. J. 373.

96. *Dix v. Van Wyck*, 2 Hill 522.

97. *James v. Oakley*, 1 Abb. Pr. 324.

98. *Fellows v. Van Hysing*, 23 How. Pr. 230.

98a. *Levy v. Horn*, 90 Misc. 624, 153 N. Y. Supp. 913.

a mortgage from their debtor, without the knowledge or assent of the creditors, the latter may ratify the transaction by subsequent assent and enforce the mortgage. Where a debtor makes at the same time several mortgages upon the same chattels to secure several creditors, the refusal of one of the creditors to accept it does not impair the validity of the mortgages accepted by the other creditors.⁹⁹

f. *Alteration of Mortgage.*—A material alteration in a chattel mortgage may have the effect of rendering it unenforceable by the mortgagee. But the fact that an alteration was made in a chattel mortgage after its execution and delivery will not divest the title of an innocent purchaser acquired under the instrument as made.¹⁰⁰ And, where one about to purchase a piano executed a mortgage thereon for a part of the purchase price before he selected the instrument, it was held that the insertion in the mortgage of the number of the piano selected was not a material alteration of the contract which would deprive the mortgagee of the power to enforce it, but that in leaving the number blank at the time of executing the instrument, the mortgagor was deemed to authorize the mortgagee to fill in the number of the piano selected.^{100a}

g. *Confusion of Goods.*—A mortgagee does not lose his title to the mortgaged property on account of a mixing thereof with similar goods by the mortgagor, where he does not consent to the confusion.¹⁰¹ And the fact that a mortgagor, with the knowledge and permission of the mortgagee, mixes articles covered by the mortgage with subsequently-acquired property, so that some of the articles covered by the mortgage cannot be distinguished from those subsequently acquired, does not render the mortgage invalid as to such of the articles covered by it as can be identified and distinguished.¹⁰²

99. *Brown v. Platt*, 8 Bosw. 324.

101. *Dunning v. Stearns*, 9 Barb.

100. *Stearns v. Oberle*, 47 Misc. 349, 94 N. Y. Supp. 37.

630.

100a. *Bloomingdale v. McKee*, 97 Misc. 660, 162 N. Y. Supp. 286.

102. *Caring v. Richmond*, 28 Hun 25.

CHAPTER V.

FILING.

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Sec. 1. Statute.

a. *In General.*—Article X of the Lien Law contains the statutory enactments relative to the filing of chattel mortgages. Section 230 of said law provides as follows:

“Every mortgage or conveyance intended to operate as a mortgage of goods and chattels or of any canal boat, steam-tug, scow or other craft, or the appurtenances thereto, navigating the canals of the state, which is not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, is absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, is filed as directed in this article. This article shall not apply to agreements creating liens upon merchandise or the proceeds thereof for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, where the conditions specified in section forty-five of the personal property law are complied with, nor shall this article apply to the mortgage or pledge of or lien upon stocks or bonds mortgaged or pledged to secure payment of a loan, which stocks or bonds, by the terms of a written instrument creating such mortgage, pledge or lien and setting forth the conditions of such loan, are to be delivered to the lender on the day such loan is made, and every such mortgage, pledge or lien of such securities, shall be valid as against creditors of such mortgagor or pledgor, provided, however, that if such securities are not delivered to the pledgee or mortgagee on the day such loan is made, the mortgage, lien or pledge therein intended to be created shall be absolutely void and of no effect as against the creditors of such mortgagor, pledgor or lienor unless such instrument, or a true copy thereof, is filed as directed in this article, on the day following the making of such loan, and provided also that every such mortgage, pledge or lien shall be absolutely void as against purchasers, pledgees or mortgagees in good faith of such stocks or bonds provided such stocks or bonds are delivered to such purchaser, pledgee, or mortgagee at the time of such purchase, pledge or mortgage.”

b. *Mortgages on Canal Boats.*—The Lien Law contains an additional provision relative to the filing of chattel mortgages on canal boats. This provides as follows: “Every mortgage upon

a canal boat or other craft navigating the canals of this State, filed as provided in this article, shall be valid as against the creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith, as long as the debt which the mortgage secures is enforceable. From the time of such filing, every such mortgage shall have preference and priority over all other claims and liens, not existing at the time of such filing.”¹

c. *Purpose of Statute.*—The object of the statute requiring mortgages of personal property to be filed is to prevent imposition upon subsequent purchasers and mortgagees. While the chattels mortgaged remain in the hands of the mortgagor, persons dealing with him respecting them are led to believe that he is the owner, and may thus be defrauded, or at least disappointed.² Upon several occasions, the purpose of the statute has been stated by the courts in other language.³

1. Lien Law, § 236.

2. *Meech v. Patchin*, 14 N. Y. 71; *Gregory v. Thomas*, 20 Wend. 17.

3. **To Protect Creditors.**—The object of the statute requiring the filing of chattel mortgages is to protect creditors against the misleading effect of the goods remaining in the possession and control of the debtor after they have been secretly transferred to another person. *Vreeland v. Pratt*, 42 St. Rep. 582, 17 N. Y. Supp. 307. See also *Commercial Bank of Rochester v. Davy*, 81 Hun 200, 30 N. Y. Supp. 718.

It was the plain purpose of the statute to require publicity to be given to chattel mortgages for the protection of the claims of persons mentioned therein. It is undoubtedly true that one and perhaps the most important purpose of the act was to protect persons giving credit to the mortgagor in ignorance of the existence of a mortgage upon his property. But the legislative policy was broader than this single purpose. *Karst v. Gane*, 136 N. Y. 321.

Secret Transfers.—It was not the design of the statute to annul securities for honest debts, but to defeat secret and colorable transfers, by requiring all instruments in the nature of chattel mortgages to be made matters of public record. The purpose of the act was not prohibitory but remedial. *Frost v. Mott*, 34 N. Y. 253.

To Give Public Notice of the Lien.—The object of the original filing of the mortgage is to give public notice of the lien, thereby affixing to the property mortgaged, as it were, an ear-mark, indicating to all persons who would purchase it the existence of the lien; and this, not only while remaining in the hands of the mortgagor, but in whose hands soever it may be. *Dillingham v. Bolt*, 37 N. Y. 198.

Chattel mortgages were recognized at common law and the statute only intervenes to declare that such security shall not be good, as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof is filed. *Baumann v. Post*, 26 Abb. N. C. 134, 16 Daly 385, 12 N. Y. Supp. 213.

d. *Construction of Statute.* — In order to maintain the validity of a chattel mortgage as against creditors and subsequent purchasers and mortgagees in good faith, there must be a strict and rigid observance of the statutory requirements.⁴ If not properly filed, the mortgage is void as to such persons without any reference to fraud or good faith on the part of the mortgagee.⁵ But when filed, it is good as against a *bona fide* purchaser who searches for but fails to find the mortgage.⁶

Sec. 2. Necessity of Filing.

a. *In General.* — All mortgages of goods and chattels are required to be filed except where the mortgagee takes possession of the mortgaged property.⁷ The statute goes further; it requires not only the filing of mortgages, but also the filing of a “conveyance intended to operate as a mortgage of goods and chattels.” This requirement is without any modification or qualification arising out of the nature or condition of the property, such as its bulk, difficulty or even impossibility of a change of possession by removal or otherwise, or any other like consideration or excuse. In these cases, though it affords a plausible reason for omitting to accompany the mortgage with an actual change of possession, it affords no excuse for a failure to file the mortgage.⁸

b. *Instruments Not Operating as Mortgage.* — The distinction between chattel mortgages and other instruments has already been treated, and the necessity of filing such other instruments discussed to a certain extent.⁹ An absolute bill of sale need not be filed,¹⁰ unless the transfer was intended to operate as a mortgage.¹¹ A pledge of chattels is not required to be filed.¹² A provision in

4. *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837.

5. *Niagara County Bank v. Lord*, 33 Hun 557.

6. *Kribbs v. Alford*, 120 N. Y. 519.

7. See *infra*, the subdivision *Change of Possession in Lieu of*, p. 63.

Necessity for Filing.—See note to N. Y. Reports, Bender Ed., Book 25, p. 773.

8. *Roy v. Birdseye*, 5 Denio 619.

9. See *supra*, the chapter *Distinguished from Other Contracts*, p. 6.

10. *Preston v. Southwick*, 115 N. Y. 139.

11. *Preston v. Southwick*, 115 N. Y. 139; *Sheldon v. McFee*, 216 N. Y. 618; *Tyler v. Strang*, 21 Barb. 198.

Filing of Bill of Sale Alone.—If a mortgage is in the form of a bill of sale with a separate defeasance, the filing of the bill of sale alone is sufficient to satisfy the statute. *Preston v. Southwick*, 115 N. Y. 139.

12. *Haskins v. Kelly*, 1 Abb. Pr., N. S., 63, 1 Rob. 160.

a lease reserving a lien on property to be grown or placed on the premises by the tenant, frequently operates as a chattel mortgage, and the lease must be filed.¹³ An agreement contained in a lease of real property that, in case the lease shall be terminated before a certain date, the erections placed upon the leased land shall become the property of the lessor, does not partake of the character of a chattel mortgage and need not be filed as such, even though it operates upon personal property.¹⁴ A lease of chattels for a specified rent with an agreement that if the lessee should punctually pay the rent for a certain number of months the lessor would give a bill of sale thereof to the lessee need not be filed as a chattel mortgage.¹⁵

c. *Property Not "Goods and Chattels."*— Only instruments affecting "goods and chattels" are required to be filed.¹⁶ Thus a mortgage of a chose in action, such as a liquor tax certificate,¹⁷ a lease of real estate,¹⁸ or a mortgage,¹⁹ is not affected by the statute. Real estate purchased for partnership purposes is personal property but a mortgage thereon executed by one partner is not a mortgage on "goods and chattels."²⁰ A mortgage upon the contingent interest of an attorney in a litigation need not be filed to preserve its validity.²¹

An agreement to give a mortgage upon a vested interest in personal property, not reducible to possession until the death of a third person, need not be filed as a chattel mortgage for the statute

13. See *supra*, the subdivision *Lease Reserving Lien*, p. 21.

property and chattels." *Niles v. Mathusa*, 162 N. Y. 546.

14. *Niagara Falls, etc., Co. v. Schermerhorn*, 132 App. Div. 442, 117 N. Y. Supp. 10.

17. *Niles v. Mathusa*, 162 N. Y. 546.

15. *Neidig v. Eifler*, 18 Abb. Pr. 353. Such an instrument is a conditional sale and should be filed as such. See *infra*, *Conditional Sales — Filing*, p. 221.

18. *Booth v. Kehoe*, 71 N. Y. 341.

16. *Chester v. Jumel*, 5 N. Y. Supp. 809, *rev'd on other grounds*, 125 N. Y. 237.

Leasehold Interests. — A chattel mortgage covering a lease for ten years need not be filed. The words "goods and chattels" do not cover leasehold interests. *State Trust Co. v. Casino Co.*, 19 App. Div. 344, 46 N. Y. Supp. 492.

19. *Harrison v. Burlingame*, 48 Hun 212; *Baxter v. Gilhert*, 12 Abb. Pr. 97.

20. *Tarbel v. Bradley*, 7 Abb. N. C. 273.

21. *Chester v. Jumel*, 5 N. Y. Supp. 809, *rev'd on other grounds*, 125 N. Y. 237.

requires the filing only of mortgages upon personality which is capable of delivery.²²

d. *Mortgage of Real and Personal Property.*—A mortgage covering both real and personal property (excepting certain corporate mortgages) should be recorded as a real estate mortgage and also filed as a chattel mortgage.²³ But an omission to file as a chattel mortgage, though it may render the mortgage ineffectual as to the personality, does not affect its lien upon the realty.²⁴

e. *Corporate Mortgages.*—By virtue of the provisions of section 231 of the Lien Law, mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation, or by any telegraph, telephone or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone or electric light corporation runs, need not be filed or refiled as chattel mortgages.²⁵

22. *Tilden v. Tilden*, 26 Misc. 672, 57 N. Y. Supp. 864.

23. *Chemung Canal Bank v. Payne*, 164 N. Y. 252; *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*; *State Trust Co. v. Casino Co.*, 19 App. Div. 344, 46 N. Y. Supp. 492; *Fitzgerald v. Atlanta Home Ins. Co.*, 61 App. Div. 350, 70 N. Y. Supp. 552; *Goodhue v. Berrien*, 2 Sandf. Ch. 630; *State Bank of Williamson v. Fish*, 120 N. Y. Supp. 365.

Agreement That Personality Shall Be Considered Realty.—While the mortgagor and mortgagee may agree as between themselves whether property shall be considered as real or personal so far as it affects their personal interests, they cannot by the agreement alter the nature of the property so as to affect the rights of other persons and so as to render nugatory the provisions of law relating to the filing of such mortgages for the protection of other

creditors and persons interested. *Matter of Munson*, 70 Misc. 461, 128 N. Y. Supp. 1106.

24. *Chemung Canal Bank v. Payne*, 164 N. Y. 252; *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753. See also *State Trust Co. v. Casino Co.*, 19 App. Div. 344, 46 N. Y. Supp. 492.

25. *Platt v. New York & Sea Beach R. Co.*, 9 App. Div. 87, 41 N. Y. Supp. 42; *Guaranty Trust Co. v. Troy Steel Co.*, 33 Misc. 484, 68 N. Y. Supp. 915; *Robson v. Dailey*, 130 N. Y. Supp. 1036. See also *Hoyle v. Plattsburgh & Montreal R. Co.*, 54 N. Y. 314.

“*Electric Light Company.*”—A gas and electric light company is included by the words: “Any . . . electric light . . . corporation.” *New York Security & Trust Co. v. Saratoga Gas & Light Co.*, 88 Hun 569, 34 N. Y. Supp. 890.

The statute, as now consolidated, includes all corporations, generally, and refers particularly to telegraph, telephone and electric light corporations, which would seem to be included necessarily within the general scope of the preceding portion of the section.²⁶ The word "bonds" as used in this statute, by virtue of the provisions of section 35 of the General Construction Law providing that words in the plural number include the singular, includes a single bond, so as to bring a mortgage securing such a bond within the provisions of the statute.²⁷ The term "real property" as used in the above statute is defined by section 290 of the Real Property Law and thus "includes lands, tenements and hereditaments and chattels real, except a lease for a term not exceeding three years."²⁸ Thus, a mortgage covering a lease for ten years and personal property is within this statute and need not be filed or resiled as a chattel mortgage.²⁹

Sec. 3. Change of Possession in Lieu of Filing.

a. *In General.* — According to the express language of section 230 of the Lien Law, it is not necessary to file a chattel mortgage where it is accompanied by an immediate delivery and a continued change of possession of the things mortgaged.³⁰ There is authority to the effect that, where the property is in the hands of a third person, an immediate delivery is not necessary as a substitute for filing.³¹ Whether there has been a change of possession is generally a question for the jury.³² The question of the change of

26. Clement *v.* Congress Hall, 72 Misc. 519, 132 N. Y. Supp. 16. Compare State Trust Co. *v.* Casino Co., 5 App. Div. 381, 39 N. Y. Supp. 258.

27. Clement *v.* Congress Hall, 72 Misc. 519, 132 N. Y. Supp. 16.

28. Westchester Trust Co. *v.* Hobby Bottling Co., 102 App. Div. 464, 92 N. Y. Supp. 482, *aff'd*, 185 N. Y. 577, *mem.*

29. State Trust Co. *v.* Casino Co., 5 App. Div. 381, 39 N. Y. Supp. 258; Westchester Trust Co. *v.* Hobby Bottling Co., 102 App. Div. 464, 92 N. Y. Supp. 482, *aff'd*, 185 N. Y. 577, *mem.*

30. Siedenbach *v.* Riley, 111 N. Y. 560; Tedesco *v.* Oppenheimer, 15 Misc. 522, 37 N. Y. Supp. 1073; Lee *v.* Huntoon, Hoff. Ch. 447; Knapp *v.* Alvord, 10 Paige 205.

At common law possession of the mortgaged chattels by the mortgagee was essential to the validity of the mortgage. There is nothing in the statute which prohibits the mortgagee from filing his mortgage and having possession as well. Lathers *v.* Hunt, 16 Daly 135, 9 N. Y. Supp. 494.

31. Goodwin *v.* Kelly, 42 Barb. 194. See also Nash *v.* Ely, 19 Wend. 523.

32. Siedenbach *v.* Riley, 111 N. Y. 560.

possession in lieu of a *refiling* of the mortgage is similar in many respects. This question is treated in another place in this work.³³

b. *Constructive Possession.* — The possession required in the mortgagee is an actual, physical possession; constructive or legal possession is insufficient.³⁴ The change of possession must be open, visible and free from concealment.³⁵ But it is not necessary in all cases that the property be removed from the premises where it was previously located.³⁶

Where no apparent change is made in the custody and control of the property, an agreement between the parties that the mortgagor is to sell the goods as agent for the mortgagee is not sufficient.³⁷ A change of possession from that of mortgagor, as such, to possession as an agent of the mortgagee is not an actual change

33. See *infra*, the subdivision *Change of Possession in Lieu of Refiling*, p. 103.

34. *Steele v. Benham*, 84 N. Y. 634; *Siedenbach v. Riley*, 111 N. Y. 560; *Tedesco v. Oppenheimer*, 15 Misc. 522, 37 N. Y. Supp. 1073; *Camp v. Camp*, 2 Hill 628. See also *Wild v. Porter*, 59 App. Div. 350, 69 N. Y. Supp. 839, *aff'd*, 173 N. Y. 614, *mem.*

"Actual change of possession imports at least something more than a mere legal or fictitious change to be worked by the operation of the mortgage itself. Upon any other construction the statute means nothing. Nor can parties agree that the mortgagor shall continue in actual possession and call this the possession of the mortgagee." *Camp v. Camp*, 2 Hill 628.

35. *Tedisco v. Oppenheimer*, 15 Misc. 522, 37 N. Y. Supp. 1073; *Steele v. Benham*, 84 N. Y. 634; *Topping v. Lynch*, 2 Rob. 484.

36. *Lee v. Huntoon, Hoff. Ch.* 447, 456, wherein the court said: "An immediate delivery and an actual and continued change of possession are consistent with the retention of the property on the same premises. Removal is an evidence, and a strong

one, of that change—but not the indispensable evidence. The exercise of ownership and control by the assignee, and above all, the absence of any such control by the assignor, appears to me the true test by which to decide the validity of the transfer. Removal may be insufficient, because the control of the assignor may be afterwards resumed; and certainly the change of possession may be as entire and continued, and the exclusion of the assignor as absolute and unequivocal, without a removal as with it. All that the statute prescribes is, that the change should be notorious, and the possession and control of the assignee indisputable and unshared."

37. *Tedesco v. Oppenheimer*, 15 Misc. 522, 37 N. Y. Supp. 1073, wherein the court said: "The change of possession intended is physical, and not merely legal or constructive. The mischief which the law was intended to prevent was the deceptive and resultant injury which would inevitably arise from the *indicia* of ownership being vested in one who had not title, or only a defeasible one, and who would thus be in a position to secure credit to which he was not

within the meaning of the statute.³⁸ A mortgagee, by setting the mortgaged property apart from other property of the mortgagor in the store of the latter and marking the articles with his name by the use of tags, does not secure such an immediate delivery and change of possession of the property as the statute requires.³⁹

Where a lessor of a farm, the crops to be divided between the lessor and lessee, reserved a lien on the growing crops, it was held that the fact that the lessor resided upon the farm did not give her actual possession of the tenant's share of the crops and that it was necessary to file the lease.⁴⁰ Where, at the time a mortgage upon certain furniture was executed, the mortgagee was boarding with the mortgagor, and the mortgagor declared in another instrument that she turned over and delivered the mortgaged chattels to the mortgagee, but the mortgagor was allowed to continue to use them in the conduct of the boarding house, it was held that the change of possession was insufficient to excuse the omission to file the mortgage.⁴¹ Where the property was in the possession of a tenant of the successor to the title of the mortgagor and the mortgagee made a demand upon such tenant for the possession of the property and left with him a written notice that he had taken actual possession thereof, the property continuing, as before, in the actual possession of the tenant, it was held that the change of possession was insufficient to relieve the mortgagee.⁴²

c. *Symbolic Possession.* — The delivery of a warehouse receipt or bill of lading, as security for a debt, is a symbolic delivery of the property represented thereby. The transaction is sometimes

entitled, and to perpetuate frauds upon the public, deluded by the evidence of title which the possession and visible dominion over property bespeaks. It is, therefore, a necessary feature of the possession to which the statute refers that it should be open, visible and free from concealment. It then becomes notice in its highest form of the claim of the possessor, and the constructive notice which arises from the filing of the mortgage becomes unnecessary. But where the change of possession is not of that character, so that it fails to

disclose itself to others than the immediate parties to the transfer, however honest they may have been in their intention, the situation exists which the statute was designed to prevent."

38. *Otis v. Sill*, 8 Barb. 102; *Camp v. Camp*, 2 Hill 628.

39. *Button v. Rathbone, Sard & Co.*, 126 N. Y. 187.

40. *Thomas v. Bacon*, 34 Hun 88.

41. *Watson v. Dealy*, 28 Misc. 544, 59 N. Y. Supp. 623.

42. *Beskin v. Feigenspan*, 32 App. Div. 29, 52 N. Y. Supp. 750.

deemed a chattel mortgage of the property, and the delivery of the instrument considered a delivery of the property so that the transaction may be sustained without the filing required by the chattel mortgage statutes.⁴³

d. *Delivery of Part of Mortgaged Chattels.* — A change of possession as to part of the mortgaged chattels is not sufficient to excuse a failure to file the mortgage. It may be avoided even as to the portion the possession of which is changed.⁴⁴

Sec. 4. Time of Filing.

a. *In General.* — The statute does not expressly limit the time within which a chattel mortgage shall be filed.⁴⁵ The courts, therefore, hold that the mortgagee is entitled, where rights of third persons do not intervene between the execution and the filing of the instrument, to a reasonable time after the execution and delivery of the mortgage, in which to file the same in the proper office.⁴⁶ What is a reasonable time depends upon the particular

43. *Bank of Rochester v. Jones*, 4 N. Y. 497; *First Nat. Bank v. Kelly*, 57 N. Y. 34.

44. *Benedict v. Smith*, 10 Paige 126, wherein the court said: "It is not material in this case that a part of the mortgaged property was delivered, inasmuch as a part thereof remained in the possession of the mortgagor. The statute does not avoid the mortgage merely as to so much of the property as remains in the possession of the mortgagor. But the mortgage itself is declared void, if not filed as directed by the act, where it is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged. And a change of possession as to part of the property included in the mortgage is not a change of possession of the things mortgaged, within the intent and meaning of the statute. The mortgage must therefore be filed, unless there is an immediate delivery of the whole property embraced

therein and a continued change of possession, or such mortgage is made absolutely and wholly void, as to creditors, by the express terms of the statute."

45. *Smith v. Acker*, 23 Wend. 653; *Karst v. Gane*, 136 N. Y. 316.

46. *Tooker v. Siegel-Cooper Co.*, 194 N. Y. 442; *Vreeland v. Pratt*, 17 N. Y. Supp. 307, 42 St. Rep. 582; *Hicks v. Williams*, 17 Barb. 523; *Smith v. Acker*, 23 Wend. 653; *In re Shiebler*, 165 Fed. 363.

The statute contains no direction as to the time within which a chattel mortgage shall be filed; and in the absence of any such provisions courts have no power to supply the deficiency, or to declare a mortgage void because of its not having been filed at the time it was executed. *Hicks v. Williams*, 17 Barb. 523.

As Soon as Practicable. — The filing must be as soon as practicable after the mortgage is delivered. The mortgagee cannot keep a security of this class a secret and proceed to enforce

circumstances of each case.⁴⁷ Delays of ten months,^{47a} six months,⁴⁸ five months,⁴⁹ nearly three months,⁵⁰ two and one-half months,⁵¹ two months,⁵² 54 days,⁵³ 57 days,⁵⁴ 39 days,^{54a} six weeks,⁵⁵ four weeks,⁵⁶

it the moment the other creditors of the mortgagor are ready to seize the property by legal process, and thwart the purpose of the vigilant creditor, by filing the mortgage and taking into his possession the property. *Parshall v. Eggart*, 52 Barb. 367, *rev'd* on other grounds, 54 N. Y. 18.

"While the purpose of the act does not in terms require an immediate filing of a mortgage in order to make it valid against creditors or subsequent mortgagees or purchasers, the purpose of the act can only be satisfied by prompt and diligent action on the part of the mortgagee in filing his mortgage. The filing stands as a substitute for immediate delivery and an actual and continued possession of the property, and avoids the conclusive presumption of fraud which would otherwise attach to the instrument under the Act of 1833 [now consolidated in Article X. of the Lien Law] in the absence of delivery and a change of possession of the mortgaged property. Some time must necessarily elapse between the execution and filing of the mortgage. Where it appears that due diligence was exercised in filing the mortgage, and there was no unnecessary delay and no actual intervening lien has been acquired, there would seem to be no ground upon which subsequent lien holders could question the validity of the mortgage under the act of 1833. The filing under these circumstances would be immediate and make the mortgage valid as against liens subsequently acquired." *Karst v. Gane*, 136 N. Y. 316.

47. *Vreeland v. Pratt*, 17 N. Y. Supp. 307, 42 St. Rep. 582.

47a. *Stich v. Pirkle*, 100 Misc. 594, 166 N. Y. Supp. 440.

48. A chattel mortgage given November 20, 1894, and not filed until June 14th is void as to creditors attaching the property June 13th and receivers thereof appointed on the same day, although their liens and debts arose subsequently to the execution of the mortgage. *Ledoux v. Bank of America*, 24 App. Div. 123, 48 N. Y. Supp. 771.

49. *Davidson v. Osborne*, 75 Misc. 391, 135 N. Y. Supp. 675.

50. *In re Schmidt*, 181 Fed. 73.

51. *Merry v. Wilcox*, 92 Hun 210, 36 N. Y. Supp. 1050.

52. A failure to file the mortgage for two months after its execution renders it void as against simple contract creditors of the mortgagor, whose claims accrued prior to the execution of the mortgage; the filing of the mortgage before the creditor obtains judgment upon his claim does not render the mortgage valid from the date of filing. *Crouse v. Schoolcraft*, 51 App. Div. 160, 64 N. Y. Supp. 640.

53. *Rudd v. Robinson*, 54 Hun 339, 7 N. Y. Supp. 535, *rev'd* on other grounds, 126 N. Y. 113.

54. *Field v. Ingraham*, 15 Misc. 529, 37 N. Y. Supp. 1135, holding that the fact that the mortgage includes property exempt from execution under section 1391 of the Code does not change the rule where the mortgagor has not claimed the exemption.

54a. *Reynolds v. Webb*, 166 N. Y. Supp. 668.

55. *Karst v. Gane*, 136 N. Y. 316, holding that the filing of the mortgage before creditor's judgment was obtained does not restore the validity of the mortgage as against creditors whose debts were in existence during the default in filing the mortgage.

56. *Tooker v. Siegel-Cooper Co.*, 194 N. Y. 442.

have rendered the filing ineffectual. The filing of a first chattel mortgage at two-thirty in the afternoon (ten days after it was executed) of the same day a second chattel mortgage was executed, cannot be regarded as notice to the second mortgagee of the first mortgage; the second mortgage is a prior lien.⁵⁷

Where a mortgage was executed on the 31st of August or the 1st of September and it was not filed until the fifth, the question whether the mortgage was filed within a reasonable time was left with the jury. The jury found it was not. It was said at General Term: "As a question of fact I doubt very much whether the jury reached a correct conclusion in that respect. The mortgagee lived some three miles from the town clerk's office, and it does not seem to me that the delay was unreasonable." The decision in the case was, however, placed upon other grounds.⁵⁸ It has been held that a delay of two days does not render the mortgage void where rights of third persons do not intervene between the execution and filing of the instrument.⁵⁹

Where the mortgage upon execution is delivered, not to the mortgagee, but to a third party, upon no condition except that it shall not be delivered at all in the event of the payment of the debt before a specified day, the reasonable time commences to run from such delivery and not from the time of the delivery to the actual mortgagee.⁶⁰

A chattel mortgage is not effective, as against creditors, or subsequent purchasers or mortgagees in good faith until it is filed. If a creditor levies upon the mortgaged property or such property is sold or mortgaged to a purchaser or mortgagee in good faith during the interval between the execution and the filing of the mortgage, the mortgage is ineffectual. The diligence of the mortgagee will not avail him.⁶¹ Thus, where a mortgage upon a canal boat in this State was executed in Pennsylvania, and an agent of

Where the mortgagee fails to file the mortgage for four weeks after execution it is void as to creditors whose debts accrued before the execution thereof. *Vreeland v. Pratt*, 42 St. Rep. 582, 63 Hun 626, 17 N. Y. Supp. 307.

57. *Huber v. Ehlers*, 76 App. Div. 602, 79 N. Y. Supp. 150.

58. *Clark v. McDuffie*, 21 N. Y.

Supp. 174, 49 St. Rep. 535. See also, *Matter of Pearlman*, 246 Fed. 874 as to a delay of six days.

59. *Smith v. Acker*, 23 Wend. 653.

60. *Tooker v. Siegel-Cooper Co.*, 194 N. Y. 442.

61. *Hathaway v. Howell*, 54 N. Y. 97; *Keller v. Paine*, 107 N. Y. 83; *Hicks v. Williams*, 17 Barb. 523; *Smith v. Acker*, 23 Wend. 653.

the mortgagee, with the utmost diligence, took the earliest train to the place where the mortgage should be filed and reached there on the following day but one hour after a levy on the boat had been made by a creditor, it was held that the mortgage, not having been filed at the time the levy was made, was ineffectual as against the creditor.⁶² And where a chattel mortgage was executed at 10 p. m. on Saturday night and was immediately delivered to the filing officer, who though not at his office marked the same as filed at that hour, it was held that where the mortgage was not taken to the clerk's office until 9 a. m., Monday, it would be void as against a levy properly made at 8 p. m. on that day.⁶³

b. *Priority of Mortgages Filed at Same Time.* — Where two mortgages are executed at the same time on the same property to different persons and both are filed at the same time, an agreement that one is to have priority over the other will be sustained. This priority cannot be affected or changed by the neglect of the owner of the mortgage accorded priority to refile it, nor by the diligence of the other mortgagee in resiling his within due time.⁶⁴

Sec. 5. Place of Filing.

a. *Statute.* — "An instrument, or a true copy thereof, if intended to operate as a mortgage of a canal boat, steam tug, scow or other craft, or of the appurtenances thereto, navigating the canals of this State, must be filed in the office of the superintendent of public works, and need not be filed elsewhere. Every other chattel mortgage, or an instrument intended to operate as such, or a true copy thereof, must be filed in the town or city where the mortgagor, if a resident of the State, resides at the time of the execution thereof, and if not a resident, in the city or town where the property mortgaged is at the time of the execution of the mortgage. If there is more than one mortgagor, the mortgage, or a certified copy thereof, must be filed in each city or town within the State where each mortgagor resides at the time of the execution thereof. In the city of New York, such instrument must be filed as follows, namely: In the borough of Brooklyn in said city, such

62. *Keller v. Paine*, 107 N. Y. 83. superior to the claim of the

63. *Hathaway v. Howell*, 54 N. Y.

97, but holding that, where the levy 64. *Wray v. Federke*, 11 J. & S.
was not good, the mortgage was 335.

instrument shall be filed in the office of the register of the county of Kings; in the borough of Queens in said city, in the office of the clerk of Queens county; in the borough of Richmond in said city, in the office of the clerk of the county of Richmond; in the borough of Manhattan in said city, in the office of the register of the county of New York, and in the borough of the Bronx in said city, in the office of the register of the county of Bronx. In every other city or town of the State, in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it must be filed therein. If the chattels mortgaged are in the city of New York at the time of the execution of the mortgage, the mortgage or a true copy thereof must be filed in the county where the mortgagor alleges to reside at the time of the execution of the mortgage, and in the county where the property is situated. All liens and mortgages, including books and papers pertaining thereto, now on file in the comptroller's office, shall be transferred to the office of the superintendent of public works, who shall preserve the same in his department, and who shall be vested with full power and authority to do and perform any and all things relating thereto in like manner and with the same force and effect as heretofore done and performed by the comptroller.⁶⁵

b. *Construction of Statute.* — If the mortgagor is a resident of the State, the mortgage must be filed in the town or city of his residence.⁶⁶ A mortgage of both realty and personalty must be filed in the town clerk's office as to the personalty; a filing in the

65. Lien Law, § 232.

The last sentence of this section was added in 1910 when the Legislature, by other amendments to the Lien Law, changed the place of filing for mortgages on canal boats from the office of the comptroller to that of the superintendent of public works.

66. Stewart v. Platt, 101 U. S. 731; *People ex rel. Stevens v. Hoyt*, 66 N. Y. 606; *Martin v. Rothschild*, 42 Hun 410; *Baumann v. Libetta*, 3 Misc. 518, 23 N. Y. Supp. 1; *Chandler v. Bunn, Hill & D.* Supp. 167; Pow-

ers *v. Freeman*, 2 Lans. 127; *Gould v. Browne*, 4 Leg. Obs. 423. See also *Jencks v. Smith*, 1 N. Y. 90.

Residence in Kings; Place of Business in New York County. — Where a mortgagor has his residence in the county of Kings, but has a place of business in the county of New York, wherein goods were sold to him, the county of Kings is the proper county in which to file a purchase-money mortgage, and it is void as to a purchaser in good faith if filed only in New York county. *Baumann v. Libetta*, 3 Misc. 518, 23 N. Y. Supp. 1.

county clerk's office is insufficient.⁶⁷ Filing in the clerk's office of the town wherein the mortgagor resided at the time of the execution of the mortgage is sufficient, though the mortgagor does not reside there at the time of the filing.⁶⁸ Thus, where a person residing in one town bought a farm and stock in another town, giving a mortgage on the stock, and a few days afterward moved his residence to the farm, it was held that the mortgage should have been filed in the town of his former residence and, as it was only filed in the town where the farm was situated, it was void as against a *bona fide* purchaser.⁶⁹

c. *Effect of Erroneous Statement of Residence.* — The fact that the mortgagor is described in the instrument as residing in a particular town or county is of no importance. A creditor or subsequent purchaser or mortgagee can show that such is not the true residence of the mortgagor and thus defeat the mortgage lien. A person or creditor dealing with the mortgaged property is bound to look for mortgages only in the town or city where the mortgagor actually resides.⁷⁰ The mortgagee or his assignee is not estopped by an erroneous recital of the mortgagor's residence; he may show the correct residence of the mortgagor and that the mortgage is properly filed at such residence.⁷¹

The statute seems to provide an exception to the requirement that the mortgage be filed in the town where the mortgagor resides

67. See *supra*, the subdivision *Necessity of Filing — Mortgages of Real and Personal Property*, p. 62.

68. *Hicks v. Williams*, 17 Barb. 523.

69. *Powers v. Freeman*, 2 Lans. 127, wherein the court said: "It is not enough to say, that the filing in Wilna was better calculated to give notice of the mortgage, than the filing in Antwerp would have been. The answer to that is, that the language of the statute is clear and explicit, in requiring it to be filed in the town where the mortgagor resides at the time of its execution, and its requirements must be observed by the mortgagee, if he would have his mortgage valid against such purchasers.

And he has no right to substitute for it anything else, though he may think it would give much better information of its existence than if he literally followed the requirements of the statute. Persons who subsequently deal with the mortgagor in regard to the mortgaged property, are bound to take notice of the requirements of the statute, and are bound to look for mortgages where the statute declares they shall be filed."

70. *Stewart v. Platt*, 101 U. S. 731; *Baumann v. Libetta*, 3 Misc. 518, 23 N. Y. Supp. 1; *Chandler v. Bunn, Hill & D.* Supp. 167.

71. *Chandler v. Bunn, Hill & D.* Supp. 167.

at the time of the execution of the mortgage, viz: "If the chattels mortgaged are in the city of New York at the time of the execution of the mortgage, the mortgage or a true copy thereof must be filed in the county where the mortgagor alleges to reside at the time of the execution of the mortgage, and in the county where the property is situated."⁷²

d. *Partnership Mortgage.* — Where the mortgaged property is owned by two or more persons, as in the case of a mortgage given by a partnership, the mortgage or a copy thereof must be filed in the town or city where each resides.⁷³ Filing in the town or city where the place of business of the firm is located is insufficient.⁷⁴

e. *Mortgage by Joint Stock Association.* — It would be extremely burdensome to file a chattel mortgage given by a joint stock association in every town or city wherein a stockholder of the association resided. In such a case, the statute is complied with when the mortgage is filed where the principal office of the company is located, or its business principally conducted.⁷⁵

f. *Mortgage of Vessel.* — The filing of mortgages on vessels of the United States is governed by federal statute. Such mortgages are treated in another chapter of this work.⁷⁶

g. *Mortgage of Canal Boat.* — Since the 1910 amendment to the statute, mortgages on canal boats must be filed in the office of the superintendent of public works. If not so filed, though filed in the clerk's office of the town wherein the mortgagor resides, they are void as to creditors, etc.⁷⁷

72. The amendment of the statute creating this exception apparently overrules some of the above decisions. But the principle involved and its application to counties other than New York has not been disturbed.

73. *Stewart v. Platt*, 101 U. S. 731; *Russell v. St. Mart*, 180 N. Y. 355; *Bueb v. Geraty*, 28 Misc. 134, 59 N. Y. Supp. 249.

Where a chattel mortgage to secure part of the purchase price of mortgaged property is given by the members of a firm, who reside in different places and the mortgage is filed in the town and county where the prop-

erty is situated and one of the partners resides, but is not filed in the city and county where the other partner resides, the mortgage is thereby rendered void as against the creditors of the mortgagors, and subsequent purchasers and mortgagees in good faith. *Russell v. St. Mart*, 180 N. Y. 355.

74. *Stewart v. Platt*, 101 U. S. 731.

75. *Nelson v. Neil*, 15 Hun 383.

76. See *infra*, the chapter *Mortgages on Vessels*, p. 189.

77. *Witherhee v. Taft*, 51 App. Div. 87, 64 N. Y. Supp. 347. See also *Sweet v. Lawrence*, 35 Barb. 337.

h. Mortgage of Liquor Tax Certificate.—Section 12-a of the Liquor Tax Law specially provides for the filing of an instrument transferring a liquor tax certificate as security. The provision is as follows: “Each county treasurer of a county or each special deputy commissioner of excise, if there be one, shall receive and file in his office every instrument in writing, tendered to him, by which an unexpired liquor tax certificate, issued by him or by his predecessor in office, or, except as herein provided, any other liquor tax certificate hereafter issued by him or his successor in office, is assigned or transferred by the holder thereof to a person as collateral security for moneys loaned or any other obligation incurred; and such county treasurer or special deputy, as the case may be, shall immediately enter in a record book to be kept by him for that purpose the name of the certificate holder, the location of the premises for which such certificate was issued, or to which such certificate may have been transferred, under what subdivision of section eight the certificate was issued, the date when issued, the name and the address of the assignee or transferee, the date of such assignment or transfer, the date such assignment or transfer was received and filed and the date of the cancellation and discharge of the same; such county treasurer or special deputy, as the case may be, shall immediately indorse upon said assignment or transfer the date of the receipt of same, the name of the holder of the certificate, the name of the assignee or transferee, the number of the certificate, the location of the premises for which the certificate was issued, or to which such certificate may have been transferred, the date of the issuance of the same, under what subdivision of section eight the certificate was issued and the date of the assignment or transfer; said indorsement shall be signed by said county treasurer, or special deputy, in whose office the same is filed and such indorsement shall be received in evidence in all courts of this state and shall be competent and sufficient *prima facie* evidence of all the facts stated therein. An assignment or transfer of a liquor tax certificate made after the taking effect of this act, as collateral security for moneys loaned to, or any other obligation incurred by, the holder of such certificate, shall be void, and no such assignment or transfer shall be thereafter made, except as hereinafter provided in respect to the assignment or transfer of a certificate issued in lieu or in renewal of an assigned or transferred certificate. An assignment or transfer of a liquor tax certificate as collateral security for moneys loaned to, or any other obligations incurred by, the holder of such certificate, on file in the office of the certificate issuing officer on the date of the taking effect of this act, shall continue to be security for the payment or satisfaction of such loans or obligations by such certificate holder or his successor or successors in interest, at the premises affected thereby or at any other premises

to which the traffic in liquors may be transferred, and for the payment or satisfaction of any additional loans to, or obligations incurred by, such certificate holder or his successor or successors in interest, to and including October thirty-first, nineteen hundred and eighteen, prior to and including which date any certificate issued in lieu of or in renewal of such assigned or transferred certificate may in like manner be assigned or transferred. Any such liquor tax certificate, or any liquor tax certificate issued in lieu of or in renewal thereof, so assigned or transferred shall continue as security for the payment of such loans or obligations, or so much thereof as remains unpaid and unsatisfied on said thirty-first day of October, nineteen hundred and eighteen, to and including the thirtieth day of September, nineteen hundred and twenty-five, prior to which latter date any certificate issued in lieu of or in renewal of any such assigned or transferred certificate may be in like manner assigned or transferred. After the thirtieth day of September, nineteen hundred and twenty-five, no liquor tax certificate whatsoever shall be assigned or transferred as collateral security for the payment of moneys loaned or any other obligation incurred, and any such assignment or transfer shall be void and of no effect."

Sec. 6. Filing of Portion of Contract.

Where a chattel mortgage is in the form of a bill of sale with a separate defeasance, the filing of the bill of sale is sufficient to satisfy the statute.⁷⁹ If the defeasance were oral, as is many times the case, no other filing would be possible.

Where, by the terms of a chattel mortgage, the debt was to be paid at the expiration of a certain number of years, "except in case default should be made in the performance of the conditions of a certain agreement this day executed," such agreement providing that the debt was to be paid in monthly installments, it was held that the mortgage was properly filed though the agreement referred to was not filed.⁸⁰

Sec. 7. The Acts of Filing and Entry.

a. *Statute.* — Section 233 of the Lien Law provides for the filing and entry of chattel mortgages as follows: "Such officers shall file every such instrument presented to them for that purpose, and indorse thereon its number and time of its receipt. They shall enter in a book, provided for that purpose, in separate columns, the names of all the parties to each mortgage so filed, arranged in alphabetical order, under the head of 'mortgagors' and 'mortgagees,' the

79. *Preston v. Southwick*, 115 N. Y. 139. 80. *Shuler v. Boutwell*, 18 Hun 171.

number of such mortgage or copy and the date of the filing thereof; and, if the mortgage be upon a craft navigating the canals, and filed in the office of the superintendent of public works, the name of the craft shall also be inserted. In the city of New York such officers shall in addition to the entry aforesaid enter in another book provided for that purpose a statement of the premises in which the chattels mortgaged are contained, arranged in alphabetical order, under the name of the street or avenue where the premises are situated and giving the number of such mortgage or copy and the date of filing thereof. In case no street or avenue is mentioned in the description, in the mortgage or copy, of the premises in which the chattels are contained; then a statement of such premises shall be entered under the title 'miscellaneous.' Except in the city of New York such officers at the time of filing of such instrument shall, upon request, issue to the person filing the same a receipt in writing, which shall contain the names of the parties to the mortgage, its date, amount and the date and time of filing thereof."

b. *Absence of Officer.*—The statute requires the filing in the office of certain officials. If filed in the office, it is not necessary that the officer be personally present at the time.⁸¹ Thus, the filing may be made by a clerk in the store of the town clerk, having charge of the office in the absence of the officer.⁸² But a proper filing requires the act of the clerk or some person in charge of the office. An unsuccessful attempt to enter the office or to leave the mortgage at the office, when no one is present, is not a proper filing.⁸³ Thus, where a mortgagee went to the town clerk's office to file a chattel mortgage, but found it closed, and, when he returned several hours afterward, the office was open but no one was present, whereupon he placed the mortgage on a desk in the office with the filing fee and wrote on the instrument a direction to file the same, it was held that the mortgage was not properly filed until the following day when the clerk discovered it.⁸⁴

81. *Dodge v. Potter*, 18 Barb. 193.

82. *Dodge v. Potter*, 18 Barb. 193.

83. *Crouse v. Johnson*, 65 Hun 337, 20 N. Y. Supp. 177.

84. *Crouse v. Johnson*, 65 Hun 337, 20 N. Y. Supp. 177, wherein the court said: "The statute requires clerks to file all chattel mortgages that are presented to them for that purpose, and enter thereon the time of receiving the same, and to deposit them in their office for inspection. To constitute a proper filing requires the act

of the clerk or some person in charge of the office. To hold that an unsuccessful attempt to enter the office, or the leaving of a paper therein, constitutes a filing, is not, we think, justified by the statute. A chattel mortgage is filed within the meaning of the statute when it is delivered to, received and kept by the proper officer, or some one in charge of the office, for the purpose of the notice the statute intended should be given."

Where a mortgage is delivered to the clerk after office hours and at a time when he is absent from his office, it is not deemed filed until it is taken to the office.⁸⁵

c. *Vacancy in Office.*—Although, by reason of a vacancy in the office, there may be no town clerk, there is a town clerk's office. Thus, where there was a vacancy in such office, but a person, having the keys to the building containing the town clerk's office, placed a mortgage among the other chattel mortgages and indorsed it "Filed Oct. 20th, 1845," it was held that the filing was sufficient.⁸⁶

d. *Omission of Officer.*—The filing consists in presenting the mortgage at the office and leaving it in the proper place with the papers in the office. The numbering, indorsement and indexing are not substantial elements of the filing. These latter acts are to be done by the officer, and their improper performance does not affect the rights of the mortgagee.⁸⁷ If a third party is misled by the failure of the officer to properly perform his duty, he must seek redress against the officer.⁸⁸

Sec. 8. Payment of Fees.

"The several clerks and registers are entitled to receive for services hereunder, the following fees: For filing each instrument, or copy, six cents; for issuing a receipt for the same, six cents; for entering the same as aforesaid, six cents; for searching for each paper, six cents; and the like fees for certified copies of such instruments or copies as are allowed by law to clerks of counties for copies and certificates of records kept by them. The superintendent of public works is entitled to receive the following fees for services performed under this article, for the use of the state: For filing each instrument or copy and entering the same, twenty-five cents; for searching for each paper, twenty-five cents; and the like fees for certified copies of such instruments or copies as are allowed by law to be charged by the superintendent of public works for copies and certificates of records kept in his office. No officer is required to file or enter any such paper, or furnish a copy thereof, or issue a receipt therefor, until his lawful fees are paid."⁸⁹

The payment or tender of the fees specified in the statute is necessary to entitle a mortgagee to demand the filing and registry of his mortgage.⁹⁰

85. *Hathaway v. Howell*, 54 N. Y. 97.

86. *Bishop v. Cook*, 13 Barb. 326.

87. *Dodds v. O'Brien*, 166 N. Y. Supp. 1065; *Dikeman v. Puekhafer*, 1 Abb. Pr., N. S., 32, 1 Daly 489; *Bishop v. Cook*, 13 Barb. 326; *Dodge v. Potter*, 18 Barb. 193. See also

88. *Dikeman v. Puekhafer*, 1 Abb. Manhattan Co. v. Laimbeer, 108 N. Y. 590, *approving* the above cases. Pr., N. S., 32, 1 Daly 489.

89. *Lien Law*, § 234.

90. *People ex rel. Stevens v. Hoyt*, 66 N. Y. 606, *rev'g* 7 Hun 39.

Sec. 9. Removal of Mortgage.

There is no duty expressly imposed upon the clerk by the chattel mortgage statutes to keep the mortgage on file. However, such a duty is reasonably implied from the nature of his office. Where a mortgage is temporarily removed from the office under a subpoena *duces tecum* at the instance of a judgment creditor, such creditor will not acquire any rights thereby superior to the mortgage by causing an execution to be levied upon the mortgaged property while the mortgage is so absent from the office.⁹¹

Sec. 10. Effect of Failure to File.

a. *As to Third Parties.*—By the statute, a chattel mortgage not filed as prescribed therein is void unless a change of possession of the property is made, as to creditors and subsequent purchasers or mortgagees in good faith. The instrument is void because the statute says so, not because it is tainted by any inherent vice.⁹² It is not void as *malum in se*, but as *malum prohibitum*.⁹³ It may be affected as to a portion of property covered thereby and enforceable as to the balance.⁹⁴

b. *As Between the Parties.*—As between the parties thereto a mortgage is valid and enforceable without filing or change of possession.⁹⁵

Sec. 11. Who May Attack Mortgage for Failure to File.

a. *In General.*—A mortgage not properly filed is void only as to the classes of persons mentioned in the statute, viz: creditors or subsequent purchasers or mortgagees in good faith.⁹⁶ Thus, the mortgagee is entitled to the mortgaged property as against a person wrongfully taking the same, though his mortgage is not filed.⁹⁷ And an un-

91. *Rogers v. Dwight*, 71 Hun 547, 25 N. Y. Supp. 39.

92. *Chemung Canal Bank v. Payne*, 164 N. Y. 252; *Niagara County Bank v. Lord*, 33 Hun 557.

93. *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178.

94. *Chemung Canal Bank v. Payne*, 164 N. Y. 252; *Hardin v. Dolge*, 46 App. Div. 416, 61 N. Y. Supp. 753.

95. *Stewart v. Platt*, 101 U. S. 731; *Ward v. Ward*, 145 Fed. 1023, 74 C. C. A. 146; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *Gandy v. Collins*, 214 N. Y. 293; *E. DeBraekeleer & Co. v. Schwabeland*, 86 Hun 143, 33 N. Y. Supp. 212, *aff'd*, 155 N. Y. 644, *mem.*; *Skilton v. Codington*, 86 App. Div. 166, 83 N. Y. Supp. 351;

Hof v. Mager, 168 App. Div. 318, 154 N. Y. Supp. 60; *Balz v. Shaw*, 13 Misc. 181, 34 N. Y. Supp. 5; *Halladay v. Worthington*, 99 Misc. 141, 163 N. Y. Supp. 362; *Zimmer v. Wheeler*, 2 St. Rep. 325; *Westcott v. Gunn*, 4 Duer 107; *Pancoast v. American Heating & Power Co.*, 66 How. Pr. 49; *Bryant v. Woodruff*, 5 Leg. Obs. 139; *Manufacturer's Bank v. Rober*, 19 Week. Dig. 476.

96. *Sheldon v. Wickham*, 161 N. Y. 500; *Hayman v. Jones*, 7 Hun 238; *Lain v. Sayer*, 50 App. Div. 554, 64 N. Y. Supp. 248; *Hof v. Mager*, 168 App. Div. 318, 154 N. Y. Supp. 60; *Crisfield v. Bogardus*, 18 Abb. N. C. 334.

97. *Moses v. Walker*, 2 Hilt. 536.

filed mortgage upon chattels brought by the mortgagor into a firm of which he becomes a member, as his proportion of the capital, is not void as against the other partners.⁹⁸ The means by which one shall attack an unfiled chattel mortgage is to be determined by the *lex fori*.^{98a}

b. *Creditor in General*.—A chattel mortgage not properly filed is void as to creditors, including simple contract creditors, whose debts were in existence at any time during the default in filing. Whether the debt accrued before or after the execution of the mortgage is immaterial.⁹⁹ But though the mortgage is void as against a simple contract creditor, he is not in a position to avail himself

98. *Rust v. Hauseit*, 14 J. & S. 22.

98a. *Halladay v. Worthington*, 99 Misc. 141, 163 N. Y. Supp. 362.

99. *Thompson v. Van Vechten*, 27 N. Y. 568; *Parshall v. Eggert*, 54 N. Y. 18; *Tremaine v. Mortimer*, 128 N. Y. 1; *Karst v. Gane*, 136 N. Y. 316; *Stephens v. Perrine*, 143 N. Y. 476; *Russell v. St. Mart*, 180 N. Y. 355; *Fraser v. Gilbert*, 11 Hun 634; *Reynolds v. Ellis*, 34 Hun 47, *aff'd*, 103 N. Y. 115; *Campbell Printing Press, etc., Co. v. Damon*, 48 Hun 509, 1 N. Y. Supp. 185; *Sheldon v. Wickham*, 27 App. Div. 628, 50 N. Y. Supp. 314; *Crouse v. Schoolcraft*, 51 App. Div. 160, 64 N. Y. Supp. 640; *Bullard v. Kenyon*, 24 N. Y. Supp. 374, 53 St. Rep. 731; *Smith v. Clarendon*, 6 N. Y. Supp. 809; *Reynolds v. Webb*, 166 N. Y. Supp. 668; *Parker v. Wagoner*, 166 N. Y. Supp. 625; *Lane v. Lutz*, 1 Keyes 203, 3 Abb. Dec. 19; *Clark v. Gilbert*, 14 Week. Dig. 241.

Debt Accruing before Execution of Mortgage.—In *Karst v. Gane*, 136 N. Y. 321, the court holding that creditors whose debts antedate the execution of the mortgage may attack the same for failure to file, said: “It is undoubtedly true that one and perhaps the most important purpose of the act, so far as it applies to creditors, was to protect persons giving credit to the mortgagor in ignorance of the existence of a mortgage upon his property. But the legislative policy was broader than this single purpose. It is impossible to say that

only creditors who became such during the existence of a mortgage may be injured by keeping the mortgage a secret. It certainly is not improbable that in many cases antecedent creditors may be lulled into security and forbear the collection of their debts at maturity, by the apparent unencumbered possession and ownership by the debtor of property covered by an undisclosed mortgage.”

An indorser, whose liability had not become fixed at the time the mortgage was filed, by the maturity and dishonor of the note to which he was a party, is not a creditor of the mortgagor within the meaning of the statute. *Karst v. Gane*, 61 Hun 533, 16 N. Y. Supp. 385, *aff'd*, 136 N. Y. 316.

The filing of the mortgage does not restore the validity thereof as against creditors whose debts were in existence during the default in filing the mortgage, although judgments or executions were not obtained until after the mortgage was in fact filed. *Karst v. Gane*, 136 N. Y. 316; *Crouse v. Schoolcraft*, 51 App. Div. 160, 64 N. Y. Supp. 640.

A simple contract creditor is as much within the protection of the statute as a creditor whose claim has been merged into judgment, but he runs the risk of having his remedy defeated by a transfer of the property from the mortgagor to the mortgagee in payment of the mortgage before he has acquired a lien thereon. *Karst v. Gane*, 136 N. Y. 316.

of the invalidity until he has procured, or is in a position to procure, a specific lien and claim against the property involved.¹⁰⁰ This means, ordinarily, that he must procure a judgment and cause execution to be issued against the property of the mortgagor.¹⁰¹ The granting of an attachment, however, is an adjudication.

Creditor's Right Assigned with Debt.—The preference of a creditor over an unfiled mortgage attaches to the debt and accompanies it when transferred in the course of the negotiation of commercial paper. *Thompson v. Van Vechten*, 27 N. Y. 568.

Mortgage on Exempt Property.—A creditor may attack an unfiled mortgage on property exempt from execution under section 1391 of the Code of Civil Procedure, where the mortgagor has not claimed the exemption. *Field v. Ingraham*, 15 Misc. 529, 37 N. Y. Supp. 1135.

Creditors Not Prejudiced.—The word "creditors" as used in the statute includes all creditors. The term is not limited to creditors who are prejudiced by the failure to file the mortgage. *In re Schmidt*, 181 Fed. 73.

100. Blennerhasset v. Sherman, 105 U. S. 100; *In re Gerstman*, 157 Fed. 549; *Thompson v. Van Vechten*, 27 N. Y. 568; *Parshall v. Eggert*, 54 N. Y. 18; *Button v. Rathbone, Sard & Co.*, 126 N. Y. 187; *Kitchen v. Lowery*, 127 N. Y. 53; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *Skilton v. Codington*, 185 N. Y. 80; *Stewart v. Beal*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*; *Campbell Printing Press, etc., Co. v. Damon*, 48 Hun 509, 1 N. Y. Supp. 185; *Castleman v. Pryor*, 55 App. Div. 515, 67 N. Y. Supp. 229, *aff'd*, 168 N. Y. 354; *Tooker v. Siegel-Cooper Co.*, 55 Misc. 68, 106 N. Y. Supp. 277, *aff'd*, 126 App. Div. 913, *mem.*; *Matter of Munson*, 70 Misc. 461, 128 N. Y. Supp.

1106; *Halladay v. Worthington*, 99 Misc. 141, 163 N. Y. Supp. 362; *Grasmuck v. Baur*, 12 Daly 180; *Ebling v. Husson*, 22 J. & S. 377, 7 St. Rep. 29.

An unfiled chattel mortgage is not absolutely void, as it is good as between the parties and as against creditors at large. It is only void as to judgment creditors or creditors armed with some legal process authorizing the seizure of the property. *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178.

101. Thompson v. Van Vechten, 27 N. Y. 568; *Jones v. Graham*, 77 N. Y. 628; *Sullivan v. Miller*, 106 N. Y. 635; *Button v. Rathbone, Sard & Co.*, 126 N. Y. 187; *Kitchen v. Lowery*, 127 N. Y. 53; *Kennedy v. Nat. Union Bank of Watertown*, 23 Hun 494; *Witherbee v. Taft*, 51 App. Div. 87, 64 N. Y. Supp. 347; *Cullen v. Ryder*, 44 Misc. 485, 89 N. Y. Supp. 465, *aff'd*, 111 App. Div. 911; *Smith v. Clarendon*, 6 N. Y. Supp. 809; *Briggs v. Austin*, 8 N. Y. Supp. 786, 29 St. Rep. 245; *Manufacturers' Nat. Bank of New York v. Rober*, 19 Week. Dig. 476.

Not Necessary that Levy Be Made.—To enable a creditor to attack a chattel mortgage on the ground that it was not filed, it is not necessary that the sheriff or officer to whom the execution was delivered should make an actual levy upon the mortgaged property; delivery to the sheriff is sufficient to give the creditor standing to come into a court of equity to have the obstruction to his levy removed. *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*; *Steffin v. Steffin*, 4 Civ. Pro. Rep. 179.

cation of indebtedness,¹⁰² and a creditor armed with such process may attack the mortgage.¹⁰³ The commencement of an action by a creditor in which a receiver is appointed may operate as a substitute for an execution or attachment.¹⁰⁴

The doctrine that a general creditor cannot attack an unfiled mortgage is simply a rule of procedure and does not affect the right, and, therefore, where the recovery of a judgment is impracticable, it is not an indispensable requisite to enforcing the rights of the creditor.¹⁰⁵ Thus, where the creditor, on account of the death of the mortgagor, cannot obtain a lien or claim upon the property, relief may nevertheless be secured in equity.¹⁰⁶

A creditor who does not obtain a judgment, but takes a bill of sale of the goods with knowledge or notice of the existence of a mortgage thereon, takes no better title than the mortgagor had, and cannot attack the mortgage.¹⁰⁷ But where a creditor, having a second mortgage on certain personal property, takes actual possession thereof, in an action by the first mortgagee for the conversion thereof, the creditor may set up the defense that the first

Where a chattel mortgage is not filed until after the delivery of an execution to the sheriff, it is void as against the latter, although actually filed before a levy. *Hale v. Sweet*, 40 N. Y. 97.

A judgment creditor, at whose request the ostensible proprietor of a business has formed a dormant partnership with a third party, which has been kept secret from other creditors, is not entitled, by reason of having first levied upon property under an attachment against the members of the partnership as partners, to precedence over other judgment creditors who had previously levied upon the same property under executions against the ostensible proprietor of the business individually. *Kings Co. Bank v. Courtney*, 69 Hun 152, 23 N. Y. Supp. 542.

Judgment creditor with no execution is not in a position to attack a chattel mortgage on account of failure to file the same. Manufacturers'

Nat. Bank of New York v. Raber, 19 Week. Dig. 476.

102. *Ledoux v. East River Silk Co.*, 19 Misc. 440, 44 N. Y. Supp. 489.

103. *Parshall v. Eggert*, 54 N. Y. 18; *Button v. Rathbone, Sard & Co.*, 126 N. Y. 187; *Castleman v. Pryor*, 55 App. Div. 515, 67 N. Y. Supp. 229, *aff'd*, 168 N. Y. 354.

104. See *Kitchen v. Lowery*, 127 N. Y. 53.

105. *Skilton v. Codington*, 185 N. Y. 80, holding that a trustee in bankruptcy may attack an unfiled mortgage through the creditors have not obtained judgments.

106. *Matter of Munson*, 70 Misc. 46, 128 N. Y. Supp. 1106. A chattel mortgage not refiled is void as to a creditor of the mortgagor, after his death, though his claim is not reduced to judgment. *Matter of McGovern*, 118 N. Y. Supp. 378.

107. *Volekers v. Sturke*, 18 Misc. 457, 42 N. Y. Supp. 87; *Davidson v. Osborne*, 151 App. Div. 747 136 N. Y. Supp. 247.

mortgage was not properly filed. In such a case, it is held that, as the instrument entitled the creditor to the immediate possession of the property, his right to take the same is as absolute as that of a creditor who has proceeded to judgment and execution.¹⁰⁸ And, where the creditor does not procure a judgment upon his claim, but the mortgagor delivers the mortgaged property to such creditor in payment of the debt, the mortgagee, if his mortgage is not properly filed, cannot object that the creditor has not procured a judgment and the mortgagee cannot recover the property or its value from such creditor.¹⁰⁹

c. *Creditor with Invalid Execution.*—An unfiled chattel mortgage is valid as against a judgment which was entered pursuant to a fraudulent scheme to cheat the creditors of the judgment debtor.¹¹⁰ But, if the judgment is valid, the mortgagee cannot complain that the execution was irregularly issued.¹¹¹ The granting of an attachment, although *ex parte*, is an adjudication of indebtedness which cannot be attacked by a mortgagee in foreclosing an unfiled mortgage.¹¹²

d. *Creditor with Knowledge of Mortgage.*—Knowledge of the existence of an unfiled mortgage is no answer to an attack thereon by a creditor. The statute renders the mortgage void as to a creditor with or without knowledge of the mortgage.¹¹³

e. *Purchaser or Mortgagee.*—A mortgage not properly filed is void as against a subsequent purchaser or mortgagee in good faith.¹¹⁴ To show good faith in a subsequent mortgage of personal property, so as to enable the holder thereof to avoid an unfiled mortgage, it must be proved by evidence *dehors* the instrument itself that the second mortgage was given for a valuable

108. *Russell v. St. Mart*, 180 N. Y. 355.

Karst v. Gane, 136 N. Y. 321; *Dunham v. Silberstein*, 32 Misc. 642, 66

391, 135 N. Y. Supp. 675.

N. Y. Supp. 475; *McDonald v. Safe Deposit & Surety Co.*, 32 Misc. 644,

66 N. Y. Supp. 475; *Barker v. Doty*, 4 Alb. L. J. 63; *Tyler v. Strong*, 21 *Barb.* 198; *Farmers' L. & T. Co. v. Hendrickson*, 25 *Barb.* 484; *Stevens v. Buffalo & N. Y. City R. Co.*, 31 *Barb.* 590.

mem.

111. *Crouse v. Schoolcraft*, 51 App. Div. 160, 64 N. Y. Supp. 640.

114. Baskins v. Shannon, 3 N. Y. 310; *Thompson v. Blanchard*, 4 N. Y.

112. *Ledoux v. East River Silk Co.*, 19 Misc. 440, 44 N. Y. Supp. 489.

303.

113. *Best v. Staple*, 61 N. Y. 71;

consideration, or to secure the payment of an honest debt.¹¹⁵ Where a subsequent mortgage was taken in good faith, the fact that it was not properly filed does not deprive it of the protection of the statute. Its priority does not depend upon filing.¹¹⁶ If the respective mortgagees of two chattel mortgages on the same property agree with the common mortgagor and with each other that the mortgage first executed shall be the first lien, such agreement will not be affected by the prior filing of the second mortgage, and can be enforced by the owner of the first mortgage not only as against the mortgagee of the second mortgage, but also as against any subsequent purchaser of that mortgage.¹¹⁷

f. *Purchaser or Mortgagee from Third Party.* — Where a person in good faith buys mortgaged chattels, not from the mortgagor, but from one who is a *mala fide* purchaser, the last purchaser is not one who can attack the mortgage for failure to file.¹¹⁸ Thus, where a wife gives a chattel mortgage, a purchaser or mortgagee from her husband is not in a position to attack the mortgage for failure to file.¹¹⁹ But where the first purchaser is in good faith, the second succeeds to his rights and can attack the mortgage.¹²⁰

g. *Purchaser or Mortgagee with Notice of Unfiled Mortgage.* — A subsequent purchaser or mortgagee of chattels, having actual knowledge of an existing mortgage thereon, is not "in good faith," and the mortgage is enforceable as against him.¹²¹

115. *Baskins v. Shannon*, 3 N. Y. 310, holding that evidence showing that, about a year before the subsequent mortgage was given, the mortgagor became indebted to the mortgagee, but not connecting the two transactions, is not sufficient.

116. *Witherbee v. Taft*, 51 App. Div. 87, 64 N. Y. Supp. 347. Compare *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

117. *Stevenson Brewing Co. v. Iba*, 155 N. Y. 224.

118. *Wooster v. Sherwood*, 25 N. Y. 278. A mortgagee in a mortgage made by a *mala fide* purchaser cannot attack a prior mortgage because it is not filed. *Hof v. Mager*, 168 App. Div. 318, 154 N. Y. Supp. 60.

119. *Balz v. Shaw*, 13 Misc. 181, 34 N. Y. Supp. 5; *Talman v. Hawhurst*, 4 Duer, 221.

120. See *Dillingham v. Bolt*, 37 N. Y. 198. See also *Allen v. Heine*, 20 N. Y. Supp. 38.

121. *Benjamin v. Elmira, J. & C. R. Co.*, 54 N. Y. 675; *Briggs v. Oliver*, 68 N. Y. 336; *Gildersleeve v. Landon*, 73 N. Y. 609; *Gandy v. Collins*, 214 N. Y. 293; *Davidson v. Osborne*, 151 App. Div. 747, 136 N. Y. Supp. 247; *Dunham v. Silberstein*, 32 Misc. 642, 66 N. Y. Supp. 475; *Henry Elias Brewing Co. v. Boeger*, 132 N. Y. Supp. 286; *Zimmer v. Wheeler*, 2 St. Rep. 325; *Sanger v. Eastwood*, 19 Wend. 514; *Gregory v. Thomas*, 20 Wend. 17. See also *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

Mala Fides. — "Clear notice of a prior claim is considered *per se* evidence of *mala fides*." *Sanger v. East-*

Where a second mortgage is given expressly subject to a prior one, the subsequent mortgagee is deemed to have actual knowledge of the prior and all its conditions, and cannot acquire a superior lien.¹²² Where a person about to make a loan on chattels, knowing that a prior unfiled mortgage on the property has been given, relies on the statement of the mortgagor that the prior mortgage has been paid without inquiry of the mortgagee, he is not a subsequent mortgagee in good faith.¹²³ Where it appeared that, when a person was about to give a mortgage to a corporation, it was stated to the president of the corporation that there was a prior mortgage upon the property, and thereupon an affidavit of the mortgagor was changed so as to set up an existing mortgage of \$85 upon the property, the corporation cannot be said to be a subsequent mortgagee in good faith.¹²⁴

h. Purchaser or Mortgagee on Account of Precedent Debt. — When the act respecting the filing of chattel mortgages was passed, the term *bona fide* purchaser had acquired a settled meaning which did not include a person whose purchase was on account of an existing debt and who parted with no property or right to obtain his conveyance.¹²⁵ Thus, it has been consistently held that a subsequent purchaser or mortgagee, where the only consideration of the transfer is an existing debt or contract, is not *in good faith* and cannot attack a prior mortgage on the ground that it was not properly filed.¹²⁶ Where a debtor's property is

wood, 19 Wend. 514. "To say that a man takes in good faith, when he acts with notice, and of course under conscious hostility to another who has before taken a similar title, would be a legal solecism." *Gregory v. Thomas*, 20 Wend. 17.

Knowledge Imputed. — The knowledge of a husband is imputed to his wife, taking a subsequent mortgage, where he acts as her agent to transact all her business. *Henry Elias Brewing Co. v. Boeger*, 132 N. Y. Supp. 286.

122. *Independent Brewing Co. v. Durston*, 55 Misc. 498, 106 N. Y. Supp. 686; *Niccloy v. Treasure*, 115

N. Y. Supp. 1030. See also *Jones v. Howell*, 3 Rob. 438.

123. *Goodwin v. Bayerle*, 18 Misc. 62, 41 N. Y. Supp. 20.

124. *Eastern Brewing Co. v. Feist*, 21 Misc. 681, 48 N. Y. Supp. 29.

125. *Van Hensen v. Radcliff*, 17 N. Y. 580.

126. *Van Heusen v. Radcliff*, 17 N. Y. 580; *Thompson v. Van Vechten*, 27 N. Y. 568. *Jones v. Graham*, 77 N. Y. 628; *Button v. Rathbone, Sard & Co.*, 126 N. Y. 187; *Kennedy v. Nat. Union Bank of Watertown*, 23 Hun 494; *Harden v. Plass*, 57 Hun 540, 11 N. Y. Supp. 226; *Doig v. Haverly*, 92 Hun 176, 37 N. Y. Supp.

conveyed to trustees to enable him to make preferences among his creditors, they are not purchasers in good faith.¹²⁷ Nor can one purchasing the mortgaged property from a second mortgagee for an antecedent indebtedness, with full knowledge of the prior mortgage, and of the claim of a preference made by the holders thereof, hold the property, as against such prior mortgagee.¹²⁸

Where mortgagors, to induce a person to become an accommodation indorser of a note, promised that, if he would indorse it, they would at any time give him a chattel mortgage for his protection if he should need it, and he did subsequently before the maturity of the note receive from them a chattel mortgage, it was held that he was a mortgagee in good faith and entitled to attack a prior mortgage not properly filed.¹²⁹ Where the payee and holder of an overdue note, given for money loaned by him to the maker, purchased personal property from the latter and

455; *Hof v. Mager*, 168 App. Div. 318, 154 N. Y. Supp. 60; *Bueb v. Geraty*, 28 Misc. 134, 59 N. Y. Supp. 249; *Bueb v. Geraty*, 36 Misc. 161, 72 N. Y. Supp. 1071; *Zimmer v. Wheeler*, 2 St. Rep. 325; *Woodburn v. Chamberlin*, 17 Barb. 446; *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

A "subsequent purchaser in good faith" is one who parts with value at the time of the transfer of title to or delivery of the identical property, and on the faith of such transfer or delivery. The term cannot be held to include one who receives the property in question either in pursuance of an executory contract of sale, or in satisfaction of an antecedent debt. *Deeley v. Dwight*, 16 Daly 300, 11 N. Y. Supp. 60, *rev'd* on other grounds, 132 N. Y. 59.

A person who takes a subsequent mortgage as a security for a precedent debt, or a purchaser who has merely given credit for the purchase price of the property upon a precedent debt is not a subsequent purchaser or mortgagee in good faith. *Button v. Rathbone, Sard & Co.*, 126 N. Y. 187.

Valuable Consideration. — No conveyance can be sustained on the ground of good faith, as against a prior unrecorded mortgage or deed for value unless made for a valuable consideration. An honest existing demand is a valuable consideration; but a conveyance on such consideration is held not to be in good faith when coming in conflict with a prior conveyance given for value. It is the want of good faith, not the want of a valuable consideration, which prevents full effect from being given to a subsequent conveyance made on account of an antecedent debt. *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

As between two mortgages given for antecedent debts, the prior, though not properly filed, is superior. *Bueb v. Geraty*, 28 Misc. 134, 59 N. Y. Supp. 249.

127. *Van Heusen v. Radcliff*, 17 N. Y. 580.

128. *Tiffany v. Warren*, 37 Barb. 571, 24 How. Pr. 293.

129. *Bueb v. Geraty*, 36 Misc. 161, 72 N. Y. Supp. 1071.

surrendered the note as the consideration of the sale, it was held that he was a purchaser in good faith.¹³⁰

i. *Purchaser at Judicial Sale.* — Where personal property is levied upon and sold under an execution, the purchaser has the same right as the judgment creditor to attack a prior mortgage on the property; if the mortgage was not properly filed, it is ineffectual as against such a purchaser, though he had actual knowledge thereof.¹³¹ A purchaser on an execution sale holds under the judgment and is entitled to priority. Any other construction of the statute would lead to the absurdity that, while a mortgage is void as to a judgment, such judgment could not be enforced because, provided the mortgagee would at any time before sale upon the execution file his mortgage and attend the sale and give notice of his mortgage, no one could purchase free therefrom.¹³²

But, if the sale is made expressly subject to the prior mortgage, the purchaser is estopped from disputing the validity of such a mortgage.¹³³

j. *Assignee of Subsequent Mortgagee.* — Where a second mortgagee had actual knowledge of a prior unfiled mortgage, his assignee, though he took the assignment of such second mortgage in good faith and for value, cannot avoid the prior mortgage.¹³⁴

k. *Subsequent Lienors.* — A person in possession of chattels, with a right to such possession, inferior only to the rights of a mortgagee thereof, where he is also a creditor of the mortgagor, is generally entitled to attack the mortgage, though he has not secured a judgment upon his debt. Thus, a subsequent mortgagee in possession, though he did not take his mortgage in good

130. *Powers v. Freeman*, 2 Lans. 127.

131. *Thompson v. Van Vechten*, 27 N. Y. 568; *Porter v. Parmley*, 52 N. Y. 185; *Best v. Staple*, 61 N. Y. 71; *Barker v. Doty*, 4 Alb. L. J. 63; *Stevens v. Buffalo & N. Y. City R. Co.*, 31 Barb. 590; *Wagoner v. Jones*, 7 Daly 375. See also *Clark v. McDuffie*, 21 N. Y. Supp. 174, 49 St. Rep. 535.

132. *Best v. Staple*, 61 N. Y. 71.

133. *Horton v. Davis*, 26 N. Y. 495; *Porter v. Parmley*, 52 N. Y. 185; *Potter v. Traders' Nat. Bank*, 70 Hun 53, 23 N. Y. Supp. 1079, *aff'd*, 143 N. Y. 668; *Clement v. Congress Hall*, 72 Misc. 519; 132 N. Y. Supp. 16; *Barker v. Doty*, 4 Alb. L. J. 63; *Wagner v. Jones*, 7 Daly 375.

134. *David Stevenson Brewing Co. v. Ibz*, 12 Misc. 329, 33 N. Y. Supp. 642, *aff'd*, 155 N. Y. 224; *Henry Elias Brewing Co. v. Boeger*, 132 N. Y. Supp. 286.

faith, may, by reason of his rights as a creditor, in some cases, attack the prior mortgage.¹³⁵ A warehouseman, in possession of chattels with a right to sell them in discharge of his lien thereon, is regarded the same as a judgment creditor in regard to his right to assail the validity of a mortgage on the property.¹³⁶ The lien of a boarding-house keeper is superior to an unfiled chattel mortgage.¹³⁷ But it has been held that an innkeeper claiming a lien is not "a creditor or subsequent purchaser or mortgagee in good faith" and not protected by the statute.¹³⁸

1. *Assignee for Creditors.*—Prior to the enactment of chapter 314 of the Laws of 1858, an assignee for the benefit of creditors was in the same position as his assignor and could not avoid acts which the assignor could not avoid. He could not attack a mortgage because it was unfiled.¹³⁹ The Act of 1858, now consolidated in section 19 of the Personal Property Law, authorizes assignees to avoid fraudulent acts of their assignors. But it is held that the failure of a mortgagee to properly file his mortgage is not a fraudulent act within the statute and the assignee has no authority to attack the mortgage upon such ground,¹⁴⁰ and this is especially true when the assignment is expressly made subject to the mortgage. But it has lately been held that under section 17 of the Debtor and Creditor Law as added by chapter 360 of the Laws of 1914, an assignee for creditors can attack an unfiled mortgage.^{140a}

m. *Receiver in Supplementary Proceedings.*—A receiver in supplementary proceedings represents not a simple contract creditor as an assignee does, but a creditor who has procured a judgment upon his claim. He can maintain any action which the judgment creditor might maintain. He may attack an unfiled mortgage upon the property of the debtor.¹⁴¹ But where the

135. *Russell v. St. Mart*, 180 N. Y. 355.

136. *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837.

137. *Corbett v. Cushing*, 15 Daly 170, 4 N. Y. Supp. 616.

138. *Matthews v. Victor Hotel Co.*, 132 N. Y. Supp. 375. This proposition, however, is of no value to the mortgagee as an innkeeper's lien is superior to a mortgage duly filed. See *Matthews v. Victor Hotel Co.*, 132 N. Y. Supp. 375.

139. *Van Heusen v. Radcliff*, 17 N. Y. 580.

140. *Sheldon v. Wickham*, 161 N. Y. 500; *Dorothy v. Servis*, 46 Hun 628, 13 St. Rep. 1; *Lain v. Sayer*, 50

App. Div. 554, 64 N. Y. Supp. 248; *Halladay v. Worthington*, 99 Misc.

141, 163 N. Y. Supp. 362; *Crisfield v. Bogardus*, 18 Abb. N. C. 334; *Marsop v. O'Neill*, 1 Month. L. Bull. 67. *Compare Bowdish v. Page*, 81 Hun 170, 30 N. Y. Supp. 691, *aff'd*, 153 N. Y. 104. *Harris v. Batjer*, 26 Misc. 702, 57 N. Y. Supp. 90.

140a. *Stich v. Pirk*, 100 Misc. 594, 166 N. Y. Supp. 440.

141. *Stephens v. Perrine*, 143 N. Y. 476; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *Brunnemer v. Cook & Bernheimer*, 180 N. Y. 188; *Watson v. Dealy*, 28 Misc. 544, 59 N. Y. Supp. 623.

mortgagee takes possession of the property before the creditor procures a judgment or attachment against the property, the receiver cannot maintain an action at law for the conversion thereof;¹⁴² his remedy is a suit in equity to set aside the transfer which prevents him from taking possession of the property. If the property has been consumed or for any reason cannot be identified or followed, he can, in the same suit, compel those legally responsible to account for it and pay over the value thereof to the extent necessary to satisfy the debts represented by him.¹⁴³

n. *Receiver of Corporation.* — There is authority to the effect that the receiver of a corporation, under section 19 of the Personal Property Law (formerly chapter 314 of the Laws of 1858), may maintain an action to set aside a mortgage executed by the corporation, but not seasonably filed.¹⁴⁴ It has been held in the Federal courts that a receiver of a corporation appointed in a suit in equity to sequester and distribute the assets of the corporation, may attack a mortgage on the ground that it was not properly filed under the State statute.¹⁴⁵

o. *Trustee or Receiver in Bankruptcy.* — Under sections 47, 67 and 70 of the Bankruptcy Act a trustee in bankruptcy is invested with power to attack a chattel mortgage on the ground that it was not properly filed, though the creditors he represents have not procured judgments.¹⁴⁶ A different rule prevailed under the former Bankruptcy Act.¹⁴⁷

142. *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178.

143. *Stephens v. Perrine*, 143 N. Y. 476; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178; *Brunnemer v. Cook & Bernheimer*, 180 N. Y. 188.

Suit by Receiver for Accounting. — A receiver, appointed in proceedings supplementary to an execution issued on a judgment against a mortgagor of chattels, may maintain a suit for an accounting by the mortgagee who has sold the mortgaged goods and become the purchaser, upon the ground that the mortgage was void because not properly filed. *Brunnemer v. Cook & Bernheimer*, 180 N. Y. 188.

144. *Rudd v. Robinson*, 54 Hun 339, 7 N. Y. Supp. 535, *rev'd* on other grounds, 126 N. Y. 113. The correctness of this decision may be disputed. See *Sheldon v. Wickham*, 161 N. Y. 500. See also *Farmers' L. & T. Co. v. Baker*, 20 Misc. 387, 46 N. Y. Supp. 266.

145. *Bell v. New York Safety Steam Power Co.*, 183 Fed. 274.

146. *Skilton v. Codington*, 185 N. Y. 80; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203. See also *Gove v. Morton Trust Co.*, 96 App. Div. 177, 89 N. Y. Supp. 247; *Stich v. Perkl*, 100 Misc. 594, 166 N. Y. Supp. 440.

147. *Stewart v. Platt*, 101 U. S. 731; *Skilton v. Codington*, 185 N. Y. 80. See also *In re Leland*, Fed. Cas. 8,234, 10 Blatchf. 503.

It has been held that a receiver in bankruptcy also may assail a chattel mortgage given by the bankrupt where it was not seasonably filed.¹⁴⁸

Sec. 12. Effect of Transfer of Chattels.

a. *To Mortgagee.*— Except as limited by the bankruptcy act and other special statutes, a debtor has the right to transfer his property to one creditor, giving such creditor a preference to the exclusion of his other creditors. Thus, where a mortgagee has failed to properly file his mortgage, if, before any lien upon the mortgaged property has been acquired by a creditor or person who may attack the mortgage, the mortgagor voluntarily transfers the mortgaged property to the mortgagee in payment of the debt or satisfaction of the mortgage, the mortgagee thereby acquires a good title to the property.¹⁴⁹ Where, before a creditor obtains

148. *In re Schmidt*, 181 Fed. 73.

149. *Tremaine v. Mortimer*, 128 N. Y. 1; *Karst v. Gane*, 136 N. Y. 316; *Stephens v. Perrine*, 143 N. Y. 476; *Bowdish v. Page*, 153 N. Y. 104; *Schwarzschild & S. Co. v. Mathews*, 39 App. Div. 477, 57 N. Y. Supp. 338; *Castleman v. Pryor*, 55 App. Div. 515, 67 N. Y. Supp. 229, *aff'd*, 168 N. Y. 354; *McDonald v. City Trust, Safe Deposit & Surety Co.*, 39 Misc. 552, 80 N. Y. Supp. 405; *Barrett v. Mack*, 64 Misc. 333, 118 N. Y. Supp. 538; *Halladay v. Worthington*, 99 Misc. 141, 163 N. Y. Supp. 362; *Blumenthal v. Lynch*, 25 Abb. N. C. 85; *Reynolds v. Webb*, 166 N. Y. Supp. 668. See also *Wild v. Porter*, 59 App. Div. 350, 69 N. Y. Supp. 839, *aff'd*, 173 N. Y. 614, *mem.*; *Donohue v. Jackson*, 15 N. Y. Supp. 458, 39 St. Rep. 916.

Rights of Creditors.—In *Tremaine v. Mortimer*, 128 N. Y. 1, the court said: "While the mortgage is void as to creditors, they cannot touch the property until they come with an execution. As between the mortgagor and the creditors, if the latter can claim that the mortgage had no existence, so also can the former make the same claim. They cannot at the

same time assert its invalidity and validity. They cannot seize the property as belonging to the mortgagor, and at the same time deny that he has any title to the property. They must constantly stand upon the position that the mortgage is a nullity. As between them and the mortgagor, both parties have the right to act as if the mortgage had never existed, and before the creditors obtain a lien on the property by virtue of their executions, the mortgagor may deal with the same in any honest way. He may sell it and convey an absolute title, subject to any rights the mortgagee has; or he can deliver the property to the mortgagee in payment of the debt secured by the mortgage, or the mortgagee can release the debt, with or without payment, and thus invest him with an absolute title, and the creditors will have no legal ground of complaint."

A transfer by one of two or more partners is sufficient to convey a good title to the mortgagee. *Schwarzschild & S. Co. v. Mathews*, 39 App. Div. 477, 57 N. Y. Supp. 338.

a judgment, the mortgagor delivers the mortgaged property to the mortgagee as a pledge for the security of his debt, the pledge is effectual as against the creditors of the mortgagor though the mortgage was not properly filed, and the fact that the mortgagee, upon receiving the pledge, at once filed his mortgage and afterwards attempted to sell under it, will not make the pledge void, and he may hold thereunder, though the attempted sale under the mortgage was void.¹⁵⁰ Where an attachment upon mortgaged property was vacated and, before a second was issued, the mortgagor sold and delivered to the mortgagee sufficient of the property to pay the debt, it was held that the sale was valid, though made hastily and without explanation. One may be hasty in paying an honest debt.¹⁵¹

But, if the mortgagee of an unfiled mortgage acquires the mortgaged property, not by a voluntary transfer by the mortgagor, but by a seizure or foreclosure under the mortgage, the mortgagee's title is still subject to the claims of creditors.¹⁵² In such case, however, the creditor cannot maintain an action at law against the mortgagee for the conversion of the mortgaged chattels, but must sue in equity to set aside the transfer as an obstruction to the collection of his debt.¹⁵³

b. *To Bona Fide Purchaser.* — Where a mortgagee takes possession of the property by virtue of the mortgage, advertises it for sale and sells it to a *bona fide* purchaser before the creditor of the mortgagor has acquired any lien upon or interest in the property by virtue of legal proceedings, such purchaser obtains a valid title which he can maintain against a receiver of the prop-

150. Blumenthal *v.* Lynch, 25 Abb. N. C. 85, 11 N. Y. Supp. 382.

151. Thompson *v.* Fuller, 8 N. Y. Supp. 62, 28 St. Rep. 4.

152. Stephens *v.* Perrine, 143 N. Y. 476; Russell *v.* St. Mart, 180 N. Y. 355; Matter of Munson, 70 Misc. 461, 128 N. Y. Supp. 1106.

Rights of Creditor. — An unfiled chattel mortgage is void as to simple contract creditors as well as to judgment creditors, and even though proceedings be had and the property sold

before the creditor has acquired his judgment and power thereby to have a lien upon the property, yet when he has secured a judgment and put himself in a position to have a lien upon the property, he may treat the transfer and foreclosure proceedings as nullities and maintain the proper proceedings for the satisfaction of his claim. Matter of Munson, 70 Misc. 461, 128 N. Y. Supp. 1106.

153. Stephens *v.* Meriden Britannia Co., 160 N. Y. 178.

erty of the mortgagor appointed in proceedings supplementary to execution, instituted upon a judgment recovered against him.¹⁵⁴

c. *To Assignee for Creditors.*—Where a mortgage is unfiled and, therefore, void as to creditors but the creditors of the mortgagor fail to avail themselves of their right to attack the mortgage until he makes an assignment for the benefit of creditors, they lose their right to levy upon his property, and the assignee takes rights superior to individual creditors and in trust for all the creditors.¹⁵⁵

154. *Merry v. Wilcox*, 92 Hun 210, St. Rep. 1; *Tremaine v. Mortimer*, 128 36 N. Y. Supp. 1050. N. Y. 1; *Bowdish v. Page*, 153 N. Y.

155. *Kitchen v. Lowery*, 127 N. Y. 104.
Dorthy v. Servis, 46 Hun 628, 13

CHAPTER VI.

REFILING.

Sec. 1. Statute.

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8. Change of Possession in Lieu of Refiling.**9. New Mortgage in Lieu of Refiling.****Sec. 1. Statute.**

- a. *In General.* — During the thirty days preceding the expiration of a year from the original filing of a chattel mortgage, if the mortgagee does not take possession of the goods, he must, to preserve his lien thereon, cause the same to be renewed or refiled. Section 235 of the Lien Law provides therefor, as follows: "A chattel mortgage, except as otherwise provided in this article, shall be invalid as against creditors of the mortgagor, and against subsequent purchasers or mortgagees in good faith, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless,

1. Within thirty days next preceding the expiration of each such term, a statement containing a description of such mortgage, the names of the parties, the time when and place where filed, the interest of the mortgagee or any person who has succeeded to his interest in the property claimed by virtue thereof, or
2. A copy of such mortgage and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, is filed in the proper office in the city or town where the mortgagor then resided, if he is then a resident of the town or city where a mortgage or a copy thereof or such statement was last filed; if not such resident, but a resident of the state, a true copy of such mortgage, together with such statement, shall be filed in the proper office of the town or city where he then resides; and if not a resident of the state, then in the proper office of the city or town where the property so mortgaged was at the time of the execution of the mortgage. Where the chattels mortgaged were located in the city of New York at the time of the execution of the mortgage, a copy of such mortgage and its indorsements together with a statement attached thereto, or indorsed thereon, showing the interest of the mortgagee or of any person who has succeeded to his interest in the mortgage, must be filed in the same office or offices where the original mortgage or a copy thereof was filed at the time of the execution of the same; provided, however, that where the mortgagor was a resident of the borough of the Bronx in the city of New York at the time of the execution of such mortgage, then a copy of such mortgage

as above described must be filed in the office of the register of the county of Bronx and also in the office of the register or of the county clerk, in case there is no register, of such county in said city in which the property so mortgaged was located at the time of the execution of such mortgage; if not such resident but the property so mortgaged was located in the borough of the Bronx in said city at the time of the execution of such mortgage, then a copy of such mortgage as above described must be filed in the office of the register of the county of Bronx and also in the office of the register or of the county clerk, in case there is no register, of such county in said city in which the mortgagor resided when such mortgage was executed; provided, further, that where the mortgagor was a resident of the borough of the Bronx in the city of New York at the time of the execution of such mortgage and the property so mortgaged was located in the borough of the Bronx at such time, then a copy of such mortgage as above described must be filed in the office of the register of the county of the Bronx and need not be filed in any other office, and provided further that where the vendee of a contract for the conditional sale of goods and chattels not attached to a building was a resident of the borough of the Bronx in said city of New York at the time of the execution of such contract, then a copy of such contract, together with a statement as required herein in the case of chattel mortgages, must be filed in the office of the register of the county of Bronx; if not such resident nor a resident of any other borough within the city of New York nor of this state at the time of the execution of such contract but the property so sold was in the borough of the Bronx

in said city when such contract was executed, then a copy of such contract and a statement as aforesaid must be filed in the office of the register of the county of Bronx. Except in the city of New York, the officer with whom such a renewal statement or copy of a mortgage is filed, shall upon request issue to the person filing the same a receipt in writing, which shall contain the names of the parties to the instrument filed, its date, amount and the date and time of filing thereof."

b. *Object of Statute.* — The object of the statute is to furnish a fair and reasonable notice to creditors and subsequent purchasers, and to prevent their being misled by the possession and apparently absolute ownership of the mortgagor.¹

c. *Construction of Statute.* — In order to maintain the validity of a chattel mortgage as against creditors and subsequent purchasers and mortgagees in good faith, there must be a strict and rigid observance of the statutory requirements.² When a creditor or subsequent purchaser or mortgagee in good faith claims the property in hostility to the mortgagee, the inquiry is:

1. *Patterson v. Gillies*, 64 Barb. 563. See also *supra*, the section *Filing—Purposes of Statute*, p. 59.

The object of the statutory provision as to a statement of the interest of the mortgagee upon a renewal is to inform creditors, purchasers, etc., of the extent of the mortgagee's claim under the mortgage, and thus to apprise them of the interest of the mortgagor which they may seek to levy upon, or give credit to, or acquire. *Beers v. Waterbury*, 8 Bosw. 396.

2. *Industrial Loan Assoc. v. Saul*,

34 Misc. 188, 68 N. Y. Supp. 837. See also *supra*, the section *Filing—Construction of Statute*, p. 60.

Refiling of Chattels in New York City.—Matter of Pearlman, 246 Fed. 874.

The statute as to refiling must be strictly observed if the validity of the mortgage, as against creditors and subsequent purchasers or mortgagees in good faith, is to be maintained. *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136; *Matter of Pearlman*, 246 Fed. 874.

Has the mortgagee complied with the statute? If not, the statute makes the mortgage void. The cause of the omission, whether by design or accident, is wholly immaterial.³

Sec. 2. Necessity.

a. *In General.* — As against the persons named in the statute, the mortgagee must refile the mortgage as provided by section 235 of the Lien Law, or take possession of the property.⁴ Even though the mortgage has become due during the year and the mortgagor is in default so that the absolute title to the mortgaged property has vested in the mortgagee, if the mortgagee permits the mortgagor to retain possession, he must refile the mortgage.⁵

b. *Corporate Mortgages.* — By statute, mortgages creating a lien upon real and personal property, executed by a corporation as security for the payment of bonds issued by such corporation,

3. *Ely v. Carnley*, 19 N. Y. 496.

4. *Ely v. Carnley*, 19 N. Y. 496; *Sloan v. National Surety Co.*, 74 App. Div. 417, 77 N. Y. Supp. 428; *Sloan v. National Surety Co.*, 111 App. Div. 94, 97 N. Y. Supp. 561, *aff'd*, 188 N. Y. 596, *mem.* See also *supra*, the subdivision *Necessity of Filing*, p. —.

5. *In re Leland*, Fed. Cas. 8,234, 10 Blatchf. 503; *Ely v. Carnley*, 19 N. Y. 496; *Porter v. Parmley*, 52 N. Y. 185; *Sloan v. National Surety Co.*, 111 App. Div. 94, 97 N. Y. Supp. 561, *aff'd*, 188 N. Y. 596, *mem.*; *Gould v. Browne*, 4 Leg. Obs. 423; *Randall v. Dunbar*, 14 Week. Dig. 332.

Reason for Rule. — In *Porter v. Parmley*, 52 N. Y. 188, the court, discussing the necessity for refileing after default by the mortgagor, said: "The same reason then remains for refileing that existed before the forfeiture. The mortgagor is, to the public, the apparent owner. The statute requires a statement to be filed, to show the true interest of the parties, for the protection of the public. Whatever its purpose, it is enough that the statute so declares. It shall 'cease to be valid' if not refiled. Any other construction would nullify the statute."

or by any telegraph, telephone or electric light corporation, and recorded as a mortgage of real property in each county where such property is located or through which the line of such telegraph, telephone or electric light corporation runs, need not be filed or refiled as chattel mortgages.⁶ This statute is discussed in another place in this work.⁷

c. *Mortgages on Canal Boats.* — A special section of the Lien Law is devoted to mortgages on canal boats. It provides as follows: "Every mortgage upon a canal boat or other craft navigating the canals of this state, filed as provided in this article, shall be valid as against the creditors of the mortgagor and against subsequent purchasers or mortgagees in good faith, as long as the debt which the mortgage secures is enforceable. From the time of filing, every such mortgage shall have preference and priority over all other claims and liens, not existing at the time of such filing." The language of this section seems to render it unnecessary to refile such a chattel mortgage, and the Attorney-General has rendered his opinion to that effect.⁸

Sec. 3. Time of Refiling.

The refile must be within the 30 days preceding the expiration of one year from the original filing. A subsequent refile does not avail the mortgagee.⁹ A refile before the thirty-day period is equally inefficient.¹⁰ In the early history of this statute, it was held that only one refile was necessary,¹¹ but the statute now requires a refile each subsequent year. Under section 20 of the General Construction Law, it seems that when the last day for refile falls on Sunday or a public holiday a refile on the following day is sufficient.

6. Lien Law, § 231.

7. See *supra*, the subdivision *Necessity of Filing — Corporate Mortgages*, p. 62. For further discussion of corporate chattel mortgages, see *supra*, the subdivision *Corporate Mortgages*, p. 42.

8. 1902 Attorney-General's Rep. 162.

Under the Act of 1864, chap. 412, a mortgage upon a canal boat was required to be filed in the office of the auditor of the canal department, and, unless refiled, was void as against creditors, etc. *Marsden v. Cornell*, 62 N. Y. 215.

9. *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837; *Herden v. Walther*, 9 N. Y. Supp. 926, 29 St. Rep. 410; *In re N. Y. Economic Printing Co.*, 110 Fed. 514; *In re Watts-Woodward Press*, 181 Fed. 71.

10. *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837; *Newell v. Warner*, 44 Barb. 258, *rev'd* on other grounds, 44 N. Y. 244; *Matter of Pearlman*, 246 Fed. 874.

11. *Newell v. Warren*, 44 N. Y. 244; *Wisser v. O'Brien*, 3 J. & S. 149. See also *Nitchie v. Townsend*, 2 Sandf. 299.

Sec. 4. Statement of Interest of Mortgagee.

The statute provides two methods to continue the effectiveness of a chattel mortgage. Either a copy¹² of the mortgage or a statement describing the same may be filed. But, in either case, a statement of the present interest of the mortgagee or the holder of the mortgage must be filed. The object of the Legislature in providing for the filing of a statement of this kind was to apprise creditors and persons dealing with the property, from year to year, of the real interest of the mortgagee in the mortgaged property.¹³ The interest of the mortgagee must be stated with substantial accuracy.¹⁴ But, if the mortgagee makes a statement in good faith, with reasonable care and it is substantially accurate, he is deemed to have complied with the statute, though it is not entirely definite and accurate to the smallest amount. Thus, a statement to the effect that the whole amount of a \$585 mortgage is due and unpaid is sufficient where only \$2 has been paid.¹⁵ But where the amount due is overstated \$100, the statement is defective.¹⁶

An understatement of the amount due does not affect the validity of the mortgage as to the amount which is stated; but the mortgagee cannot, as against the parties designed to be protected

12. The filing of the original mortgage with an indorsement exhibiting the interest claimed by the mortgagee is equivalent to filing a "copy." Stockham *v.* Allard, 2 Hun 67, 4 T. & C. 279.

13. Scott *v.* 1,000 Island Boat & Engine Co., 134 N. Y. Supp. 150.

A compliance with the act will give the creditor full information as to the property mortgaged, the amount of the debt or condition of the mortgage, and to what extent the property can be made available for the payment of his debt. When the paper filed fails to accomplish these purposes, it falls short of the requirement of the statute. *Ely v. Carnley*, 19 N. Y. 496.

14. Marsden *v.* Cornell, 62 N. Y.

215.

15. Patterson *v.* Gillies, 64 Barb. 563, wherein the court said: "If the mortgagee should fraudulently make a false statement by which the amount remaining unpaid should be wilfully exaggerated; or should wilfully and with a view to hinder, embarrass or mislead creditor or purchasers, make a statement so vague and indefinite as not to answer the substantial object and purpose of the statute, the statement must be held insufficient and void. And perhaps a grossly inaccurate or vague statement, even without any fraudulent intent, where it appeared that the mortgagee had the means of making it definite and accurate, might be held not to be a compliance with the statute."

16. Ely *v.* Carnley, 19 N. Y. 496.

by the statute, afterwards claim that any greater sum is secured by the mortgage than is mentioned in terms or by intelligible reference in the statement.¹⁷ Thus, where a mortgage was given to secure the payment of certain notes and also to secure the mortgagee against outstanding liabilities, and the statement did not refer to such liabilities, it was held that the mortgage was valid, as against subsequent purchasers, so far as the amount due upon the notes, but was not properly renewed as to any outstanding liabilities.¹⁸

A statement is sufficient which refers to a document annexed to and filed with it, if the two papers, read in connection with the original mortgage, disclose the interest of the mortgagee intelligently.¹⁹ Where the mortgagee wrote to the town clerk stating that the mortgage had not been satisfied and asking the clerk to again record the same, it was held that the letter was insufficient to constitute a proper statement.²⁰ Where the mortgagee procured an indorsement upon the mortgage originally filed of the words, "refiled and renewed," which was signed by the clerk, it was held that the statement was insufficient.²¹ Where the words "no interest to date" were indorsed in pencil on the copy filed as a renewal of the mortgage, it was held that the mortgagee's interest was not properly stated.²²

Sec. 5. By Whom Refiled.

The statement of the renewal of a mortgage must be made by the mortgagee or his attorney. A statement by the mortgagor, or other third person, is not sufficient.²³ But where the statement is made by the mortgagor, it may contain sufficient to constitute

17. *Beers v. Waterbury*, 8 Bosw. 396.

the public of the defendant's interest in the property claimed by virtue thereof."

18. *Beers v. Waterbury*, 8 Bosw. 396.

21. *Fitch v. Humphrey*, 1 Denio. 163.

19. *Beers v. Waterbury*, 8 Bosw. 396.

22. *Theriot v. Prince*, 1 Edm. Sel. Cas. 219.

20. *Scott v. 1,000 Island Boat & Engine Co.*, 134 N. Y. Supp. 150, wherein it was said: "The mere statement that the mortgage was not satisfied, without stating the precise amount which would be required to satisfy it, utterly fails in apprising

23. *Osborn v. Alexander*, 40 Hun 323; *Newell v. Warner*, 44 Barb. 258, *rev'd* on other grounds, 44 N. Y. 244. See also 1902 Attorney-General's Rep. 207.

a new mortgage and thus be valid from the time of its filing.²⁴ But the mere indorsement of a certificate or acknowledgment of the amount due upon a copy of the mortgage filed by the mortgagor is not the execution of a new mortgage.²⁵

Sec. 6. Effect of Failure.

a. *As to Creditors, Subsequent Purchasers or Mortgagees.* — A failure to properly refile or renew a chattel mortgage renders it absolutely void as against the persons named in the statute,— creditors or subsequent purchasers or mortgagees in good faith.²⁶ As to such persons it is of no more force than if it had never existed.²⁷

b. *As between Parties.* — As between the parties thereto, a mortgage, though not refiled, is valid.²⁸

Sec. 7. Who May Attack Mortgage for Failure.

a. *In General.* — As a general proposition only those persons specifically mentioned in the statute can attack a mortgage for a failure to refile.²⁹ It is not necessary that the mortgage be refiled to enable the mortgagee to maintain an action against a third person for taking the chattels from the possession of the mortgagor within a year from the original filing.³⁰ And it has been held that the omission to refile does not render the mortgage void as against the lien of a farmer pasturing a mortgaged horse.³¹

b. *Creditor.* — A creditor can, as a general proposition, attack a mortgage for a failure to refile under the same circumstances as for a failure to file originally.³² If not properly renewed, the

24. *Smith v. Cooper*, 22 Hun 11, holding, where the mortgagor indorsed on the mortgage and signed the following statement: "This chattel mortgage is hereby renewed for one year from this date," that in legal effect a new mortgage was given.

25. *Osborn v. Alexander*, 40 Hun 323. See also *infra*, the section *New Mortgage in Lieu of Refiling*, p. 105.

26. *In re Cutting*, 145 Fed. 388; *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892.

27. *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892.

28. *In re Cutting*, 145 Fed. 388; *Stewart v. Cole*, 43 Hun 164; *Commercial Bank of Rochester v. Davy*, 81 Hun 200, 30 N. Y. Supp. 718.

29. *Wiles v. Clapp*, 41 Barb. 645. See also *supra*, the subdivision *Who May Attack for Failure to File*, p. 77.

30. *Manning v. Monaghan*, 10 Bosw. 231, *rev'd* on other grounds, 28 N. Y. 585.

31. *Bissell v. Pearse*, 21 How. Pr. 130.

32. See *supra*, p. 77.

mortgage is void as to creditors, whether judgment or simple contract creditors, and whether their debts accrued before or subsequent to the default in refiling.³³ A creditor, however, is not generally in a position to attack the mortgage until he has procured a judgment and execution or some specific lien or claim upon the mortgaged chattels.³⁴ But where the mortgagor dies and thus renders the recovery of a judgment impracticable, the mortgage may be deemed void as to a creditor though his claim is not reduced to judgment.³⁵ And where a warehouseman has possession of the mortgaged property with a right to sell it in

33. *Thompson v. Van Vechten*, 27 N. Y. 568; *Bowdish v. Page*, 81 Hun 170, 30 N. Y. Supp. 691, *aff'd*, 153 N. Y. 104; *State Trust Co. v. Casino Co.*, 5 App. Div. 381, 39 N. Y. Supp. 258; *Matter of Van Houten*, 18 App. Div. 301, 46 N. Y. Supp. 190; *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837; *Kilburn v. Low*, 12 Week. Dig. 556; *Randall v. Dunbar*, 14 Week. Dig. 332.

Creditors of Decedent.—The omission by a creditor of a decedent to refile his chattel mortgage renders its lien ineffectual as against other creditors. *Matter of Van Houten*, 18 App. Div. 301, 46 N. Y. Supp. 190.

The word "creditors" includes all creditors who are such while the goods are in the possession of the mortgagor, irrespective of the time when they became such, that is, whether before or after the mortgage. *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892.

Distinction Between Mortgagee and Creditor.—Though a mortgagee cannot avail himself of an omission to refile the mortgage unless he became such during the continuance of the default, it is otherwise of a general creditor, who may take advantage of such omission though his right accrued previous to the default. *Thompson v. Van Vechten*, 27 N. Y. 568.

34. *In re N. Y. Economical Printing Co.*, 110 Fed. 514; *In re Cutting*, 145 Fed. 388; *Bowdish v. Page*, 81 Hun 170, 30 N. Y. Supp. 691, *aff'd*, 153 N. Y. 104; *Schwab Mfg. Co. v. Aizenman*, 106 App. Div. 478, 94 N. Y. Supp. 729; *Cullin v. Ryder*, 44 Misc. 485, 89 N. Y. Supp. 465, *aff'd*, 111 App. Div. 911; *Beebe v. Prime*, 99 Misc. 668, 166 N. Y. Supp. 56.

Procuring Specific Lien or Claim.—While the failure to refile a chattel mortgage renders it unenforceable as against subsequent creditors, a subsequent creditor must, before he is in a position to assert the unenforceability of the mortgage as against him, invoke the judicial process of the court, either by levying upon the property under execution or by placing it in the custody of the court through the medium of a receiver. *Schwab Mfg. Co. v. Aizenman*, 106 App. Div. 478, 94 N. Y. Supp. 729.

The provisions of the statute cannot be invoked by a mere general creditor of the mortgagor whose claim has not been reduced to the form of a judgment, or which is not evidenced by some legal process, nor by one who does not hold the property by virtue of a lien under which he has a right to sell it. *Robinson v. Kaplan*, 21 Misc. 686, 47 N. Y. Supp. 1083.

35. *Matter of McGovern*, 118 N. Y. Supp. 378; *Beebe v. Prime*, 99 Misc. 668, 166 N. Y. Supp. 56.

discharge of his lien thereon, he is regarded as a judgment creditor in respect to assailing the mortgage.³⁶ A creditor taking possession of the mortgaged property under a second chattel mortgage may also be in a position to attack the prior mortgage.³⁷

c. *Purchaser or Mortgagee*. — A mortgage not properly renewed is void as against a subsequent purchaser or mortgagee in good faith who takes his conveyance during the default.³⁸ The cognate question of purchasers and mortgagees attacking a mortgage for failure to file is discussed in another place.³⁹

d. *Purchaser or Mortgagee Within Year*. — The term "subsequent" as used in section 235 of the Lien Law means after the time for refileing has passed.⁴⁰ Thus a purchaser or mortgagee of the property within one year from the original filing cannot attack the mortgage for failure to refile.⁴¹

e. *Purchaser or Mortgagee from Third Party*. — The term "purchasers," as used in the statute, is not expressly limited to purchasers from the mortgagor.⁴² Thus, though a purchaser taking his conveyance before the expiration of a year from the original filing cannot attack the mortgage, a *bona fide* purchaser or mortgagee, after the year, from such purchaser will acquire a good title as against the mortgagee.⁴³ The first purchaser can thus convey a better title than he himself had.⁴⁴ And, where a second mortgage is given within a year after the filing of the first which was not properly refiled, on a sale under the second mortgage after the year, the purchaser takes a title superior to the first.⁴⁵ So, a subsequent purchaser with actual knowledge thereof

36. *State Trust Co. v. Casino Co.*, 5 App. Div. 381, 39 N. Y. Supp. 258; *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837.

37. See *Russell v. St. Mart.*, 180 N. Y. 355.

38. *Gibson v. Ferris*, 30 St. Rep. 663, 9 N. Y. Supp. 525.

39. See *supra*, p. —.

40. *Meech v. Patchin*, 14 N. Y. 71.

41. *Meech v. Patchin*, 14 N. Y. 71; *Thompson v. Van Vechten*, 27 N. Y. 568; *Dillingham v. Bolt*, 37 N. Y. 198; *Jaqueth v. Merritt*, 29 Hun 584; *Schwab Mfg. Co. v. Aizenman*, 106

App. Div. 478, 94 N. Y. Supp. 729; *Wolff v. Rausch*, 22 Misc. 108, 48 N. Y. Supp. 716; *Latimer v. Wheeler*, 30 Barb. 485, *aff'd*, 3 Abb. Dec. 35; *Wiles v. Clapp*, 41 Barb. 645; *Wray v. Federke*, 11 J. & S. 335; *Shutter v. Ward*, 16 Week. Dig. 69.

42. *Dillingham v. Bolt*, 37 N. Y. 198.

43. *Dillingham v. Bolt*, 37 N. Y. 198; *Jaqueth v. Merritt*, 29 Hun 584; *Beskin v. Tergenspan*, 32 App. Div. 29, 52 N. Y. Supp. 750. *Compare Wiles v. Clapp*, 41 Barb. 645.

44. *Dillingham v. Bolt*, 37 N. Y. 198.

45. *Jaqueth v. Merritt*, 29 Hun 584.

is not in a position to attack a prior mortgage, but this does not prevent him from giving to a purchaser from him, ignorant of the existence of the mortgage, who pays a valuable consideration for the chattel, a title free from the operation of the mortgage.⁴⁶ Upon the death of the mortgagor, a purchaser in good faith from his executor, administrator or person succeeding to the mortgagor's equity of redemption, may attack a mortgage not refiled.⁴⁷

f. *Purchaser or Mortgagee for Antecedent Debt.* — A purchaser or mortgagee of chattels where the sole consideration for the conveyance is an antecedent debt is not a purchaser in good faith and cannot attack the mortgage for failure to refile.⁴⁸

g. *Purchaser or Mortgagee with Actual Notice.* — A subsequent purchaser or mortgagee, with actual knowledge of a prior mortgage upon the property cannot be considered a purchaser in good faith and cannot avoid the mortgage because the mortgagee neglected to properly refile the same.⁴⁹ To charge a purchaser of mortgaged property, as subordinate to the mortgage, on the ground of actual notice where the purchase is made after the expiration of the one year and no renewal is filed, it is not enough to show that the purchaser knew of the original mortgage; it must be shown that, when he purchased after the expiration of

46. *Marsden v. Cornell*, 62 N. Y. 215.

47. *Fox v. Burns*, 12 Barb. 677.

48. *Jones v. Graham*, 77 N. Y. 628; *Wiles v. Clapp*, 41 Barb. 645. See also *supra*, the subdivision *Purchaser or Mortgagee on Account of Precedent Debt*, p. 83.

49. *Hill v. Beebe*, 13 N. Y. 556; *Lewis v. Palmer*, 28 N. Y. 271; *Gildersleeve v. Landon*, 73 N. Y. 609; *Mack v. Phelan*, 92 N. Y. 20; *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136; *Cullen v. Ryder*, 44 Misc. 485, 89 N. Y. Supp. 465, *aff'd*, 111 App. Div. 911; *Beers v. Waterbury*, 8 Bosw. 396; *Wray v. Federke*, 11 J. & S. 335; *Gregory v. Thomas*, 20 Wend. 17.

Sufficient Evidence of Notice. — Where, in a contest between two mortgagees of the same property, the

first mortgagee testified that, before the second took their mortgage, he told their agent that he held a mortgage upon the property and the amount that was due upon it, and the mortgagor testified that he informed the second mortgagees, when the mortgage was given, that the prior mortgage was unpaid, and the agent of the second mortgagees admitted that he knew of the former mortgage but not of its amount, and the subsequent mortgagees admitted that they had knowledge of the mortgage but not that it was unpaid, it was held that the evidence was sufficient to sustain a finding that the subsequent mortgagees took their mortgage with actual knowledge of the former. *McCormick v. Venable*, 12 N. Y. Supp. 152, 34 St. Rep. 717.

the year, he knew or had notice that the mortgage debt had not been paid.⁵⁰ Where, at the time a chattel mortgage is executed, the mortgagee is informed by the mortgagor that there is a prior mortgage upon the property, but that it is invalid or satisfied, it becomes the duty of the mortgagee to make further inquiry and, if he neglects to do so and it develops that the former mortgage is a valid subsisting lien, the subsequent mortgage will not have a preference on the ground that the prior mortgage was not refiled.⁵¹ But if, at the time of the execution of the subsequent mortgage, more than a year has expired since the filing of the prior mortgage and the mortgagee thereof has made no attempt to refile or renew the same the subsequent mortgagee may properly rely upon the mortgagor's statement that the prior mortgage has been paid. In such a case, the mortgagee, by failing to refile, says in effect, that the mortgage has been discharged, or at least that it is invalid as to subsequent purchasers or mortgagees.⁵²

h. *Purchaser at Execution Sale.*—Where a creditor of a mortgagor levies upon and sells the mortgaged property under an execution, the purchaser succeeds to the rights of the creditor and, though he has knowledge of the mortgage, he may attack the same, if the mortgagee has omitted the duty of refiled.⁵³ But where the sale is made expressly subject to the lien of the mortgage, the purchaser takes subject to the mortgage and cannot object to the mortgagee's failure to refile.⁵⁴

i. *Tortfeasor Paying Judgment for Conversion.*—A person who pays a judgment rendered against him for the conversion of a chattel acquires title to the chattel, but he is not a purchaser in good faith within the meaning of the chattel mortgage statute and cannot attack a prior mortgage on the ground that it was

50. *Power v. Freeman*, 2 Lans. 127.

Notice of the facts, to render a defective statement in the renewal of a mortgage sufficient as against a subsequent purchaser, must be actual notice, not merely of the mortgage, but of the actual amount for which the mortgage was held as security when he purchased. *Beers v. Waterbury*, 8 Bosw. 396.

51. *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892.

52. *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892.

53. *David Stevenson Brewing Co. v. Eastern Brewing Co.*, 22 App. Div. 523, 48 N. Y. Supp. 89; *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136.

54. See *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136. See also *supra*, the subdivision *Purchaser at Judicial Sale*, p. 85.

not properly refiled.⁵⁵ Although a tortfeasor acquiring title to a mortgaged chattel by paying a judgment for its conversion cannot attack the mortgage as a *bona fide* purchaser, where, prior to the recovery of such judgment, there has been a default in payment as required by the condition of the mortgage, and thereby the mortgagee has become the absolute owner subject only to the right of redemption, and has the right to immediate possession, so that he as well as the mortgagor, or his assigns, could have maintained an action for its conversion, satisfaction of a judgment for full value in favor of the latter transfers to the judgment debtor the title of both, and an action to recover possession cannot be maintained against him by the mortgagee.⁵⁶

j. *Receiver.* — It has been held that a receiver in supplementary proceedings cannot attack a mortgage made by his debtor on the ground that it was not refiled.⁵⁷ But it is now well settled that such a receiver can assail the mortgage when the default is in the original *filings*,⁵⁸ and no substantial reason appears for a different rule in the case of refiled.

On the other hand, it has been held that a receiver of a corporation appointed in voluntary dissolution proceedings may avoid a mortgage given by the corporation if it is not properly renewed.⁵⁹

55. *Marsden v. Cornell*, 62 N. Y. 215, wherein the court said: "Doubtless the effect of the action of trover for chattels, pursued to judgment for the full value thereof, and satisfaction of the judgment got, is to transfer to the defendant the title in the goods which the plaintiff had, and it may be that the defendant in such a case pays the price of the chattels and is technically a purchaser. But I am not able to conclude therefrom that he is such a purchaser as is meant in the provisions of the statutes requiring the filing and refiled with statement, of chattel mortgages. I think they mean one who becomes the buyer of goods by contract, by the mutual assent of the parties, express or implied; who of his own desire negotiates for them, and pays a price

agreed upon, and receives a transfer of them, from one who of his own will sells and delivers them; and that they do not mean a wrongdoer upon the property, who against his will is cast in judgment for the value of it, and takes title unwilling by operation of law, upon payment of the judgment. The policy and intent of the enactments were to protect creditors and honest dealers with the property, against hidden or unknown liens; they had no thought of guarding wrongdoers."

56. *Marsden v. Cornell*, 62 N. Y. 215.

57. *Steward v. Cole*, 43 Hun 164.

58. See *supra*, p. 87.

59. *Farmers' L. & T. Co. v. Baker*, 20 Misc. 387, 46 N. Y. Supp. 266.

This is in accord with at least one decision relative to *filings*,⁶⁰ but the correctness thereof is, owing to later decisions, an open question.⁶¹

k. *Trustee in Bankruptcy.*—A trustee in bankruptcy represents the creditors of the bankrupt, and may maintain an action for the recovery of property mortgaged by the bankrupt, where the mortgage was not properly renewed.⁶²

Sec. 8. Change of Possession in Lieu of Refiling.

Where the mortgagee takes the mortgaged property into his possession before the expiration of a year from the original filing, it is not necessary for the preservation of his rights that he refile or renew the mortgage.⁶³ And if the mortgagor voluntarily transfers the mortgaged chattels to the mortgagee in partial or full discharge of the mortgagee's debt before the creditor obtains an execution or specific lien upon the property, the mortgagee's title will be sustained though the mortgage was not refiled.⁶⁴

60. *Rudd v. Robinson*, 54 Hun 339, 7 N. Y. Supp. 535, *rev'd* on other grounds, 126 N. Y. 113.

61. See *Sheldon v. Wickham*, 161 N. Y. 500.

62. *Scott v. 1,000 Island Boat & Engine Co.*, 134 N. Y. Supp. 150. See also *Skilton v. Codington*, 185 N. Y. 80.

63. *Porter v. Parmley*, 52 N. Y. 185; *Stanley v. Nat. Union Bank*, 115 N. Y. 122; *Breeze v. Bayne*, 202 N. Y. 206; *Otis v. Sill*, 8 Barb. 102; *Simmons v. Osgoodhy*, 16 Week. Dig. 429.

Where a mortgagee, prior to the expiration of a year from the time a mortgage is first filed and after default by the mortgagor, takes the property into his actual possession, his failure to subsequently refile the mortgage pursuant to the statute does not make his title as such mortgagee in possession invalid as against the creditors of the mortgagor. *Breeze v. Bayne*, 202 N. Y. 206.

The public administrator of the city of New York has the same right

as a private administrator of a mortgagor to avoid the mortgage by showing it fraudulent, as against creditors, but the mortgagee's omission to file a statement exhibiting the interest of the mortgagee in the property, as required by statute, will not have that effect, where the mortgagee had taken possession under his mortgage during the life of the intestate, and before the lien of any other creditors had attached. *Levin v. Russell*, 42 N. Y. 251.

Advertisement for Sale.—Where a mortgagee of chattels advertises the same for sale, under the power of sale contained in the mortgage, previous to the expiration of one year from the time of the filing of the mortgage, he need not refile the mortgage. *Otis v. Sill*, 8 Barb. 102.

64. *Tremaine v. Mortimer*, 128 N. Y. 1; *Commercial Bank of Rochester v. Davy*, 81 Hun 200, 30 N. Y. Supp. 718.

Assignment for Creditors.—If the creditor does not acquire a lien upon

The possession of a mortgagee under a chattel mortgage which renders refiling thereof unnecessary must be an actual and continued change of possession which is open and public.⁶⁵ Mere words do not constitute a change of possession. Thus, where a firm, of which the mortgagor was a member, was using the mortgaged chattels, it was held that an agreement between the mortgagor and mortgagee, after default, that a partner of the mortgagor should retain possession of the property for the mortgagee, where the property was used as before, was not a sufficient change of possession to excuse refiling.⁶⁶ Where a husband executed a mortgage upon certain personal property used in his manufacturing business and the mortgage was thereafter assigned to his wife, and she claimed that she took possession of the property and gave her husband a power of attorney to carry on the business for her, agreeing to pay him a certain amount per month, but he continued to carry on the business as before, and she took no personal charge thereof except the appointment of her husband as agent and going to the shop once or twice when she gave directions, it was held that the change of possession was not sufficient.⁶⁷ Where it appeared that the mortgagee, upon default in the payment of the mortgage upon certain machinery, went to the mortgagor's place of business and laid his hands upon each article mentioned in the instrument, saying that it was his property and that he demanded possession of the same, but he thereupon left the property, which could have been removed by him, in the custody of the mortgagor and allowed it to be used by the mortgagor in its business, it was held that the mortgagee did not take actual possession of the property and the mortgage was void as against the mortgagor's creditors because it was not refiled.⁶⁸ But, upon a second appeal in the same litigation, it appeared that the room wherein the machinery was located was leased by the mortgagor and that, at the time of the default, the term of the

the mortgaged property before the mortgagor makes an assignment for the benefit of a creditor, or before the mortgagee takes possession, the creditor cannot attack the mortgage on the ground that it was not refiled. *Tremaine v. Mortimer*, 128 N. Y. 1.

65. *Farmers' L. & T. Co. v. Baker*, 20 Misc. 387, 46 N. Y. Supp. 266.

66. *Porter v. Parmley*, 52 N. Y. 185.

67. *Steele v. Benham*, 84 N. Y. 634.

68. *Sloan v. National Surety Co.*, 74 App. Div. 417, 77 N. Y. Supp. 428.

lease had expired, and the mortgagee demanded payment of the mortgage which was refused, and then went to the room and demanded the machinery as his, and secured a lease of the room containing the machinery from the owner, and employed and paid persons to operate the machinery, and it was held that an actual possession in the mortgagee was established.⁶⁹

Sec. 9. New Mortgage in Lieu of Refiling.

The failure of the mortgagee to renew his mortgage does not vitiate a new mortgage subsequently given and filed.⁷⁰ But the mortgagee, in such a case, runs the risk of the rights of creditors, or purchasers or mortgagees in good faith intervening between the expiration of a year from the filing of the first mortgage and the filing of the second.⁷¹

69. *Sloan v. National Surety Co.*, 111 App. Div. 94, 97 N. Y. Supp. 561, *aff'd*, 188 N. Y. 596, *mem.* *v. Alexander*, 40 Hun 323; *Lee v. Huntoon, Hoff. Ch.* 447.

70. *Walker v. Henry*, 85 N. Y. 130; *Smith v. Cooper*, 22 Hun 11; *Osborn v. Alexander*, 40 Hun 323. See also *Jaqueth v. Merritt*, 29 Hun 584.

CHAPTER VII.

FRAUDULENT MORTGAGE.¹

SEC. 1. Retention of Possession of Property by Mortgagor.
 2. Reservation by Mortgagor of Disposal of Property.
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 c. Effect of Failure to Deliver Proceeds to Mortgagee.
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 3. Fraudulent Trust.
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 a. In General.
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 5. Mortgage Fraudulent in Part.
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Sec. 1. Retention of Possession of Property by Mortgagor.

At common law, when chattels were transferred by sale or mortgage, the retention by the mortgagor of the possession thereof was a badge of fraud which might render the mortgage fraudulent and void as to the creditors of the mortgagor.² This rule was incorporated in the Revised Statutes in the following language: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold, mortgaged or assigned, shall be

1. See *Moore on Fraudulent Conveyances* for a general discussion of the subject.

2. *Terwilliger v. Ontario, Carbon-* dale, etc., R. Co., 149 N. Y. 86. See also *McLachlan v. Wright*, 3 Wend. 348; *Lewis v. Stevenson*, 2 Hall 63; *Divver v. McLaughlin*, 2 Wend. 596.

presumed to be fraudulent and void, as against the creditors of the vendor, or the creditor of the person making such assignment, or subsequent purchaser in good faith; and shall be conclusive evidence of fraud, unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in good faith, and without any intent to defraud such creditors or purchasers.”³

Under this statute, the presumption of fraud could be repelled by evidence of good faith, and, where there was any evidence thereof, the fraud was a question for the jury.⁴ The chattel mortgage statute originally enacted in 1833 did not affect this provision of the Revised Statutes; it only afforded another objection to the validity of a mortgage where possession of the property was not changed.⁵

The statute rendering chattel mortgages presumptively fraudulent where the mortgagor retained possession of the mortgaged property remained in force until 1897, when it was replaced by

3. 2 Rev. St. 136, § 5.

4. *Thompson v. Blanchard*, 4 N. Y. 303; *Frost v. Mott*, 34 N. Y. 253; *Hollacher v. O'Brien*, 5 Hun 277; *Tunis v. Hodge*, 50 Hun 410, 3 N. Y. Supp. 228, *aff'd*, 121 N. Y. 671; *Otis v. Sill*, 8 Barb. 102; *Swift v. Hart*, 12 Barb. 530; *Groat v. Rees*, 20 Barb. 26; *Hull v. Carnley*, 2 Duer 99, *rev'd* on other grounds, 11 N. Y. 501; *Fairbanks v. Bloomfield*, 5 Duer 434; *Stewart v. Slater*, 6 Duer 83; *Butler v. Van Wyck*, 1 Hill 438; *Hanford v. Artcher*, 4 Hill 271; *Hall v. Tuttle*, 8 Wend. 375; *Collins v. Brush*, 9 Wend. 198; *Gardner v. Adams*, 12 Wend. 297; *Murray v. Burtis*, 15 Wend. 212; *Doane v. Eddy*, 16 Wend. 523; *Beekman v. Bond*, 19 Wend. 444; *Bennett v. Earll*, 21 Wend. 117; *Smith v. Acker*, 23 Wend. 653.

Choses in Action.—The statute applied only to goods and other things of which possession could properly be predicated, and not to what the law denominates as things

in action as contradistinguished from things in possession. *Curtis v. Leavitt*, 17 Barb. 309, *mod.*, 15 N. Y. 9.

Property in Possession of Third Person.—Where the property was not left in the possession of the mortgagors, but remained with a third person, to whom it had been previously delivered, the case did not fall within the statute. *Nash v. Ely*, 19 Wend. 523.

Mortgagee and Landlord.—The statute had no application as between a mortgagee and landlord. *Frishey v. Thayer*, 25 Wend. 396.

Right to Contest Was Personal.—The right of a *bona fide* purchaser of goods to contest the validity of a prior mortgage on the ground of continuance of possession in the mortgagor, was strictly personal to the former. *Rust v. Morse*, 2 Hill 655.

5. *Otis v. Sill*, 8 Barb. 102; *Wood v. Lowry*, 17 Wend. 492; *Smith v. Acker*, 23 Wend. 653.

section 25 of the Personal Property Law (chapter 417 of the Laws of 1897). This section was drawn in language somewhat similar to the earlier statute, but it expressly excluded from its operation chattel mortgages and instruments intending to operate as such.⁶ Section 25 of the Personal Property Law was continued practically unchanged in the Consolidated Laws,⁷ but was expressly repealed when the act codifying the law of sales was enacted in 1911.⁸ The statute relating to sales of goods contains no parallel section, though some of the sections indicate legislative intention to preserve at least the common-law rule.⁹ With no statute on the subject it can be argued with considerable weight that the common law is again in force, but it has since been held that the retention of possession by a mortgagor is not necessarily evidence of fraud.^{9a}

Sec. 2. Reservation by Mortgagor of Disposal of Property.

a. *In General.*—As a general proposition, where a chattel mortgagor is permitted by an agreement with the mortgagee to dispose of the mortgaged property and to use the proceeds thereof for his own benefit, the mortgage is fraudulent and ineffectual as against creditors of the mortgagor.¹⁰ Such fraudulent arrange-

6. This statute provided as follows: "Every sale of goods and chattels in the possession or under the control of the vendor, and every assignment of goods and chattels by way of security or on any condition, but not constituting a mortgage nor intended to operate as a mortgage, unless accompanied by an immediate delivery followed by actual and continued change of possession, is presumed to be fraudulent and void as against all persons who are creditors of the vendor or person making the sale or assignment, including all persons who are his creditors at any time while such goods or chattels remain in his possession or under his control or subsequent purchasers of such goods and chattels in good faith; and it is conclusive evidence of such fraud, unless it appear, on the part of the person claiming under the sale or assignment, that it was made in good faith, and without intent to defraud such creditors or purchasers."

Mortgages Executed Before 1897.—Chattel mortgages executed before the enactment of the Personal Property Law are presumptively fraudulent where possession of the property is not changed. *Briggs v. Gelm*, 122 App. Div. 102, 106 N. Y. Supp. 693.

7. Personal Property Law, § 36.

8. Chapter 571 of the Laws of 1911, adding sections 82-158 of the Personal Property Law.

9. See Personal Property Law, §§ 106, 107.

9a. *Halladay v. Worthington*, 99 Misc. 141, 163 N. Y. Supp. 362.

10. *In re Hartman*, 185 Fed. 196; *Griswold v. Sheldon*, 4 N. Y. 581; *Edgell v. Hart*, 9 N. Y. 213; *Ford v. Williams*, 13 N. Y. 577; *Russell v. Winne*, 37 N. Y. 591; *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168; *Hangen v. Hache-meister*, 114 N. Y. 566; *Mandeville v. Avery*, 124 N. Y. 376; *Skilton v. Codington*, 185 N. Y. 80; *Zartman v. First Nat. Bank*, 189 N. Y. 267; *Dolson v. Sexton*, 11 Hun 565; *Bainbridge v. Richmond*, 17 Hun 391.

ment may or may not be contained in the mortgage. A mortgage in the usual form is void as to creditors, where such unlawful agreement exists between the parties, though it is not expressed in words.¹¹ Such an agreement may be inferred from the fact

aff'd, 78 N. Y. 618, *mem.*; *Ball v. Shafter*, 26 Hun 353, *aff'd*, 98 N. Y. 622; *Hedges v. Polhemus*, 9 Misc. 680, 30 N. Y. Supp. 556; *Boshart v. Kirley*, 34 Misc. 241, 69 N. Y. Supp. 623, *aff'd*, 67 App. Div. 624, *mem.*, 74 N. Y. Supp. 112; *Pfuke v. Popuhas*, 42 Misc. 15, 85 N. Y. Supp. 541; *Wise v. Rider*, 34 N. Y. Supp. 782, 68 St. Rep. 716; *Marston v. Vultee*, 8 Bosw. 129, 12 Abb. Pr. 143; *Wagner v. Jones*, 7 Daly 375; *Wood v. Lowry*, 17 Wend. 492; *Baillargeon v. Dumoulin*, 165 App. Div. 730, 151 N. Y. Supp. 112; *Abrams v. Proctor*, 148 N. Y. Supp. 213.

See also note to *N. Y. Reports*, Bender Ed., Book 5, p. 706.

Explanation of Rule.—In *Russell v. Winne*, 37 N. Y. 591, the court said: "If there is an agreement by the mortgagee that the mortgagor may sell or dispose of any of the property for his own benefit, it is established, conclusively, that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any real interest in such property. It is evident that, as to such property, the mortgagee, not having any real interest therein, such real interest remains in the mortgagor. Why then, is the mortgage given upon such property? Evidently, the better to enable the mortgagor to enjoy benefit thereof, at the expense of creditors. Were there no creditors of the mortgagor, there would be no object in giving or taking mortgages accompanied with such an agreement. It is, I think, clear, that such an agreement shows that the mortgage was not made in good faith, and without a design to hinder creditors."

A mortgage on a stock of goods where there is an understanding between the parties that the mortgagor

may go on and sell the stock and use the proceeds as his own, is void as to creditors. The cases so holding proceed upon the ground that such a transaction is necessarily fraudulent as to creditors, as it hinders and delays them, without securing the application of the property or its proceeds to the payment of the debt. *Goldsmith v. Levin*, 8 St. Rep. 313.

A mortgage by a corporation is not valid as against creditors where the mortgagor retains possession of the property and sells it precisely as it had been doing before the mortgage was given and without regard for that instrument. *Robson v. Dailey*, 130 N. Y. Supp. 1036.

11. *Russell v. Winne*, 37 N. Y. 591; *Southard v. Benner*, 72 N. Y. 424; *Brackett v. Harvey*, 91 N. Y. 214; *Potts v. Hart*, 99 N. Y. 168; *Hangen v. Hachemeister*, 114 N. Y. 566; *Bainbridge v. Richmond*, 17 Hun 391, *aff'd*, 78 N. Y. 618, *mem.*; *Spurr v. Hall*, 46 App. Div. 454, 61 N. Y. Supp. 854; *Southard v. Pinckney*, 5 Abb. N. C. 184; *Marston v. Vultee*, 8 Bosw. 129, 12 Abb. Pr. 143.

Explanation of Rule.—In *Potts v. Hart*, 99 N. Y. 168, the court said: "It matters not whether the agreement that the mortgagor may continue to deal in the property for his own benefit is contained in the mortgage or exists in parol outside of it; and where the agreement exists in parol, it matters not whether it is valid so that it can be enforced between the parties or not; for whether valid or invalid, it is equally effectual to show the fraudulent purpose for which the mortgage was given, and the fraudulent intent which charac-

that the mortgagee has permitted sales to be made for the use of the mortgagor.¹²

The question arises frequently in connection with a mortgage upon a stock of goods. Where the mortgagor has the power to continue the business and sell the goods in the same manner as before the execution of the mortgage, with power to use the proceeds for the support of himself and family, and the purchase of new goods, the mortgage is fraudulent.¹³ A method, however, is now outlined by statute which the parties may follow and thus escape the strictness of the rules here stated.¹⁴

A mortgage is fraudulent where the arrangement between the mortgagor and mortgagee is that the former may continue to deal in the mortgaged property for his own benefit so long as the latter consents thereto.¹⁵ Where the agreement is that the mortgagor may sell the goods and apply the proceeds on notes secured thereby as fast as possible, the mortgage is fraudulent.¹⁶ Where there is a

terizes it. It is always open to creditors to assail, by parol evidence, a mortgage or bill of sale of property as fraudulent and void as to them. While between the parties the written contract may be valid, and the outside parol agreement may not be shown or enforced, yet it may be shown by creditors for the purpose of proving the fraudulent intent which accompanied and characterized the giving of the written instrument. It is usually difficult to prove by parol an agreement in terms that the mortgagor may continue to deal in the property for his own benefit. Parties concocting a fraudulent mortgage would not be apt to put the transaction in that unequivocal form. But all the facts and circumstances surrounding the giving of the mortgage, and the subsequent dealing in the property with the knowledge and assent of the mortgagee, may be shown and they may be sufficient to justify the court or jury in inferring the agreement; and so the parol agreement was inferred in all the

cases which have come under our observation."

Tacit Understanding.—An agreement between a chattel mortgagee and the mortgagor that the mortgagor may sell the mortgaged property for his own benefit will render the mortgage void as to the mortgagor's creditors, whether the agreement is expressed in the mortgage itself or exists by tacit understanding and arrangement between the parties. *Randall v. Carman*, 89 Hun 84, 35 N. Y. Supp. 53, *aff'd*, 154 N. Y. 783. Whether there has been such a tacit understanding is generally a question for the jury. *Abrams v. Proctor*, 148 N. Y. Supp. 213.

12. *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168; *Hangen v. Hochemeister*, 114 N. Y. 566; *Williston v. Jones*, 6 Duer 504.

13. *Bracket v. Harvey*, 91 N. Y. 214; *Ford v. Williams*, 13 N. Y. 577. And see the cases cited *supra*.

14. Personal Property Law, § 45. See *infra*, the chapter *Mortgage on Stock of Goods*, p. 186.

15. *Potts v. Hart*, 99 N. Y. 168.

16. *Ball v. Shafter*, 26 Hun 353, *aff'd*, 98 N. Y. 622.

parol agreement between the parties to the effect that the mortgagors are to remain in the possession of the property and to sell and dispose of it in the ordinary course of trade, and out of the proceeds of such sales to pay the expenses of conducting the business, such as rents, salaries, etc., the mortgage is invalid as to creditors.¹⁷ Where the property is left in the possession of the mortgagor pursuant to an agreement between him and the mortgagee that he may go on with it as before, and sell it for the support of his wife and children, the mortgage is fraudulent, though the mortgagee is the mother of the mortgagor.¹⁸

Where a lease of a store and a stock of goods contained a clause that the lessor should have a lien on all the goods and personal property brought on the premises belonging to the lessee and provided that "such lien, however, shall not be enforced against any property which, being a part of the stock in trade, shall have been sold in the regular course of business," it was held that the provision giving a lien was void as to creditors of the lessee.¹⁹ Where, in a lease of a farm, the lessor reserved a lien upon the crops but the instrument provided that the lessee was "to market the crops," it was held that the lien was ineffectual as against purchasers of such crops from the lessee.²⁰ Where a mortgage on a stock of goods required the mortgagor to pay the proceeds thereof to the mortgagee, but only after the deduction of expenses, such as rent, clerk hire, and similar items, it was held that the mortgage was fraudulent.²¹

The rule rendering such mortgages fraudulent should be applied, if possible, in a reasonable manner and not in such a way that some slight mistake or oversight, or some trivial permission or license in respect to the use of the property, may destroy an otherwise valid security, when the parties thereto have acted in good faith and without intent to hinder, delay or defraud creditors.²² Thus, the fact that, upon the delivery of a chattel mortgage covering an undivided one-half of a quantity of hay situated upon a farm occupied by the mortgagor, the latter obtained permission from the

17. *Hardt v. Deutsch*, 30 App. Div.[~] 589, 52 N. Y. Supp. 335.

18. *Marston v. Vultee*, 8 Bosw. 129,

12 Abb. Pr. 143.

19. *Reynolds v. Ellis*, 103 N. Y. 115.

20. *Milliman v. Neher*, 20 Barb. 37.

21. *Skilton v. Codington*, 185 N. Y.

80.

22. *Spurr v. Hall*, 46 App. Div. 454,

61 N. Y. Supp. 854.

mortgagee to feed from the hay five horses kept on the farm, two of which belonged to the owner of the farm, and three to the mortgagor himself, two of the latter being covered by a chattel mortgage held by the mortgagee, and that at least four of these five horses were fed from the hay, for about a month, until the mortgagee took possession of it during which time they consumed about three dollars' worth, does not necessarily render the instrument fraudulent.²³

b. *Sale for Benefit of Mortgagee.* — The general rule, rendering a chattel mortgage void as to creditors where the mortgagor is given permission to sell or dispose of the property, is subject to at least one important exception. Where the sale or disposal is not for the benefit of the mortgagor but is for the benefit of the mortgagee, as where the proceeds of the sale are to be rendered to the mortgagee in discharge of the mortgage indebtedness, the mortgage is not necessarily fraudulent as to creditors.²⁴ Such a sale and application of the proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee to do exactly what the latter had the right to do, and what it was his privilege and duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt.²⁵

Where an oral agreement accompanied a purchase-money mortgage to the effect that the mortgagor would manufacture the goods into other articles and sell the same, and, when sold, would pay the mortgagee the amount received on the cash sales, and assign to him the accounts for sales made on credit, the cash and accounts to be applied when paid or assigned in payment of the mortgage debt, it was held that the mortgage was not invalid as a matter of law.²⁶ Where a mortgage upon logs and lumber did not expressly

23. *Spurr v. Hall*, 46 App. Div. 454, 61 N. Y. Supp. 854.

24. *In re Hartman*, 185 Fed. 196; *Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelley*, 28 N. Y. 360; *Miller v. Lockwood*, 32 N. Y. 293; *Brackett v. Harvey*, 91 N. Y. 214; *Spaulding v. Keyes*, 125 N. Y. 113;

Skilton v. Codington, 185 N. Y. 80; *Dolson v. Sexton*, 11 Hun 565; *Caring v. Richmond*, 22 Hun 369; *Kerr v. Dildine*, 6 St. Rep. 163.

25. *Brackett v. Harvey*, 91 N. Y. 214.

26. *Caring v. Richmond*, 22 Hun 369.

authorize the mortgagor to sell the property but, in effect, provided that the lumber mortgaged and that which would be manufactured from the logs was to be delivered to the mortgagees and received by them at a price which they had previously paid the mortgagor for such lumber, and the value thereof should be applied, on the mortgage debt, it was held that the mortgage was not fraudulent in law.²⁷ Where a chattel mortgage provided that the mortgagor was to act as the agent of the mortgagees in selling the mortgaged property and such additions thereto as the mortgagees might make, the agency to be revocable at the pleasure of the mortgagees, and that the mortgagor was to render weekly statements to the mortgagees, remitting at the same time the proceeds of the sales less expenses, it was held that, in the absence of an agreement that the mortgagor was to retain from the sales more than a reasonable compensation, or that the mortgagees knew that he was appropriating more than this, the mortgage was not necessarily fraudulent.²⁸

Where a chattel mortgage upon a stock of goods and goods to be acquired for purposes of sale in the store was executed pursuant to a contract that the debt was to be paid in installments of fifty dollars per month, "or as near said sum as the profits of the business will warrant," it was held that the mortgage was fraudulent as to the creditors of the mortgagor.²⁹ Where a purchase-money mortgage upon a stock of goods empowered the mortgagor to make sales from the goods and required him to pay over to the mortgagee, not the amount of the goods sold, but simply the purchase price of each item of the goods so sold, as set forth in an inventory taken at the time of the sale, which inventory was not embraced in or filed with the chattel mortgage, it was held that the mortgage was void as against the mortgagor's creditors.³⁰

c. Effect of Failure to Deliver Proceeds to Mortgagee. — In a case where the mortgagor becomes an agent of the mortgagee under

27. *Johnson v. Curtis*, 42 Barb. 588. 35 N. Y. Supp. 53, *aff'd*, 154 N. Y.

28. *Havens v. Exstein*, 9 N. Y. Supp. 783.

605, 31 St. Rep. 43. 30. *Pfeiffer v. Roe*, 108 App. Div.

29. *Randall v. Carman*, 89 Hun 84, 54, 95 N. Y. Supp. 1014.

the rule discussed in the preceding subdivision, where the mortgagor is authorized to sell the mortgaged property and pay over the proceeds to the mortgagee, the mortgage is not necessarily vitiated by the failure of the mortgagor to perform his duty and render such proceeds to the mortgagee.³¹ But as against a creditor or innocent third party, the principal must suffer for the wrong of his agent, and the proceeds of such sales, though retained by the mortgagor or used for his own benefit, are deemed applied on the mortgage,³² though, as between the mortgagor and mortgagee, the debt remains unpaid.³³

Where a mortgage contained a provision that the mortgagor was "to remain and continue in quiet and peaceable possession of the said goods and chattels and in the free use and enjoyment of the same . . . until default be made in the payment of the said sum of money," it was held that the possession and sale of the goods by the mortgagor did not require the application of the proceeds thereof on the mortgage debt.³⁴

Where there are two chattel mortgages upon the same property and the prior mortgagee consents that the subsequent may sell a portion of the property and apply the proceeds on his mortgage, the prior mortgagee is not compelled to credit the proceeds thereof on his mortgage as against an unsecured creditor of the mortgagor; such a creditor is not injured by such sale.³⁵

d. Disposal of Stock of Goods and Substitution of Others. — An agreement, whether expressed in the mortgage or not, that the mortgagor of a stock of goods may sell the goods and purchase others with the proceeds, the lien of the mortgage to attach to the

31. *Spaulding v. Keyes*, 125 N.Y.113.

32. *Conkling v. Shelley*, 28 N.Y.360; *Brackett v. Harvey*, 91 N.Y.214; *Skilton v. Codington*, 185 N.Y.80; *Ellsworth v. Phelps*, 30 Hun 646; *Sperry v. Baldwin*, 46 Hun 120.

Rule Not Applicable. — This rule, however, does not apply to a mortgage on a stock of goods where the proceeds of the whole business ex-

ceed the mortgage debt but it does not appear what proportion thereof came from the mortgaged property. *Brackett v. Harvey*, 91 N.Y.214.

33. *Brackett v. Harvey*, 91 N.Y.214; *Ellsworth v. Phelps*, 30 Hun 646.

34. *Sims v. Hodge*, 21 St. Rep. 955, 3 N.Y. Supp. 228.

35. *Sperry v. Baldwin*, 46 Hun 120, 11 St. Rep. 609.

purchased goods, is generally deemed fraudulent.³⁶ But where the agreement between the parties is that the mortgagor may sell the property and deliver the proceeds to the mortgagee and that the mortgagor may use a part of the proceeds to replenish the stock, in which event monthly mortgages are to be executed to cover the subsequently acquired property, and such mortgages are in fact given, such later mortgages are not fraudulent as to creditors of the mortgagor.³⁷

e. *Sales Not Made Pursuant to Agreement.* — It is the unlawful agreement between the mortgagor and mortgagee that vitiates the mortgage as against creditors; the fact that sales are made without the knowledge of the mortgagee or, even with his knowledge, when not made pursuant to such a fraudulent agreement, will not render the mortgage invalid. A fraudulent agreement may, however, be inferred from the fact of sales with the knowledge of the mortgagee.³⁸ To avoid a chattel mortgage valid on its face

36. *Edgett v. Hart*, 9 N. Y. 213; *Gardner v. McEwen*, 19 N. Y. 123; *Skilton v. Codington*, 185 N. Y. 80; *Zartman v. First Nat. Bank*, 189 N. Y. 267; *Ball v. Slafter*, 26 Hun 353, *aff'd*, 98 N. Y. 622; *Smith v. Cooper*, 27 Hun 565; *Cook v. Bennett*, 60 Hun 8, 14 N. Y. Supp. 683; *Newman v. Peysen* 80 Misc. 404, 141 N. Y. Supp. 422; *Robson v. Dailey*, 130 N. Y. Supp. 1036; *Baillargeon v. Dumoulin*, 148 N. Y. Supp. 443, *aff'd*, 165 App. Div. 730, 151 N. Y. Supp. 112; *Southard v. Pinckney*, 5 Abb. N. C. 184; *Yates v. Olmsted*, 65 Barb. 43, *mod.* 56 N. Y. 632; *Mittnacht v. Kelly*, 3 Keyes 407, 5 Abb. Pr., N. S., 442. See also *Stedman v. Batchelor*, 8 N. Y. Supp. 37, 28 St. Rep. 436.

37. *Brackett v. Harvey*, 91 N. Y. 214; *Hincks v. Field*, 14 N. Y. Supp. 247, *aff'd*, 129 N. Y. 633, *mem.* See also *Skilton v. Codington*, 185 N. Y. 80; *In re Hartman*, 185 Fed. 196.

38. *In re Hartman*, 185 Fed. 196; *Frost v. Warren*, 42 N. Y. 204; *Southard v. Benner*, 72 N. Y. 424; *Hangen v. Hochheimer*, 114 N. Y.

566; *Sperry v. Baldwin*, 46 Hun 120, 11 St. Rep. 609; *Glover v. Ehrlich*, 62 Misc. 245, 114 N. Y. Supp. 992; *Thompson v. Fuller*, 8 N. Y. Supp. 62, 28 St. Rep. 4; *Hincks v. Field*, 14 N. Y. Supp. 247, 37 St. Rep. 724, *aff'd*, 129 N. Y. 633, *mem.*; *Vreeland v. Pratt*, 17 N. Y. Supp. 307, 42 St. Rep. 582; *Wise v. Ryder*, 34 N. Y. Supp. 782, 68 St. Rep. 716; *Manufacturers', etc., Bank of Buffalo v. Koch*, 8 St. Rep. 37; *Hastings v. Parke*, 22 Alb. L. J. 115; *Williston v. Jones*, 6 Duer 504; *McAdam v. Spielberg*, 1 Month. L. Bul. 71.

Where there was no express agreement or stipulation, verbal or written, that the mortgagor should remain in the possession of the merchandise mortgaged and sell it in the usual course of business, but the mortgagor did continue in the possession of the merchandise and sold part of it in the usual course of trade at retail, with the knowledge of the

upon the ground that there was a parol agreement that the mortgagor could sell the property for his own benefit, the agreement must be proven; the mere expectation of one party or the other is not enough; it must be the conscious concurrent assent of both. It must be proven, not merely suspected, for it is an attempt to establish fraud where innocence is presumed, and to contradict by parol the actual written agreement of the parties and reduce that to a mere cover or artifice.³⁹

f. *Sales on Credit.*—If a mortgagor is authorized to sell the mortgaged goods on credit and to use the accounts for his own benefit, the mortgage is fraudulent as to creditors.⁴⁰ But where the sales upon credit are to be for the benefit of the mortgagee, as where the mortgage contains a stipulation allowing the mortgagor to sell the property for good business paper running sixty or ninety days, which paper the mortgagee agrees to take and apply on the mortgage debt, the mortgage is not necessarily fraudulent.⁴¹

If, however, the accounts arising from credit sales are not to be credited at their face value as payment upon the mortgage at the time of the sale, but are to be so applied only when collected, the mortgage is void as to creditors.⁴² Thus, where a manufacturer of boots and shoes mortgaged to one of his creditors all his stock and goods manufactured and to be manufactured, and it was agreed that he should remain in possession and continue to manufacture and sell, either for cash or credit, the cash to be paid to the mortgagee when the sales were made and the accounts to be so applied when collected, it was held that the mortgage was fraudulent.⁴³

mortgagee, though there was no proof that any part of the proceeds had been applied on the mortgage, it was held that the mortgage was *not*, as a matter of law, fraudulent as against the creditors of the mortgagor. *Hastings v. Parke*, 22 Alb. L. J. 115.

39. *Brackett v. Harvey*, 91 N. Y. 214.

40. *Ostrander v. Fay*, 3 Abb. Dec.

431. See also *Ball v. Slafter*, 26 Hun 353, *aff'd*, 98 N. Y. 622; *In re Hartman*, 185 Fed. 196.

41. *Brackett v. Harvey*, 91 N. Y. 214. See also *Kerr v. Dildine*, 6 St. Rep. 163.

42. *City Bank of Rochester v. Westbury*, 16 Hun 458.

43. *City Bank of Rochester v. Westbury*, 16 Hun 458.

g. *Question for Court or Jury.* — Where the entire agreement between the mortgagor and mortgagee is reduced to writing, it is entirely a question of law whether the arrangement gives the mortgagor an unlawful power of disposition of the mortgaged property and is fraudulent as to creditors.⁴⁴ Where, however, the agreement is not contained in the written instruments, but is inferred from the fact that sales have been made or the evidence as to the arrangement is controverted, whether the fraud exists is a question for the jury.⁴⁵ If the testimony is not controverted and clearly shows such an unlawful agreement, there is no question for submission to the jury.⁴⁶

h. *Effect of Transfer of Property to Mortgagee.* — Though a mortgage giving the mortgagor the power to dispose of the property for his own benefit may be void as to creditors, the debt secured by such a mortgage may be valid, and where the mortgagor, before a creditor procures a judgment upon his debt or otherwise becomes in a position to attack the mortgage, voluntarily transfers the mortgaged property to the mortgagee in payment of the mortgage debt, the transfer will be sustained as against the creditor. It may amount to a preference voidable in bankruptcy proceedings but otherwise it is a preference which the debtor may make.⁴⁷ Or the debtor, in such a case, may give another mortgage to the same mortgagee, and the latter mortgage may be valid.⁴⁸ The creditors of the mortgagor, however, may

44. *Edgell v. Hart*, 9 N. Y. 213; *Ford v. Williams*, 24 N. Y. 359; *Williston v. Jones*, 6 Duer 504.

45. *Gardner v. McEwen*, 19 N. Y. 123; *Ford v. Williams*, 24 N. Y. 359; *Frost v. Warren*, 42 N. Y. 204; *Chatham Nat. Bank v. O'Brien*, 6 Hun 231; *Bainbridge v. Richmond*, 17 Hun 391, *aff'd*, 78 N. Y. 618, *mem.*; *Hills v. White*, 71 Hun 511, 24 N. Y. Supp. 1065; *Stedman v. Batchelor*, 8 N. Y. Supp. 37, 28 St. Rep. 436; *Vreeland v. Pratt*, 17 N. Y. Supp. 307, 42 St. Rep. 582; *Manu-*

facturers', etc., *Bank of Buffalo v. Koch*, 8 St. Rep. 37; *Williston v. Jones*, 6 Duer 504.

46. *Chatham Nat. Bank v. O'Brien*, 6 Hun 231; *Marston v. Vultee*, 8 Bosw. 129.

47. *Zimmer v. Hays*, 8 App. Div. 34, 40 N. Y. Supp. 397; *Hardt v. Deutsch*, 30 App. Div. 589, 52 N. Y. Supp. 335; *Brown v. Plait*, 8 Bosw. 324.

48. *Wise v. Rider*, 34 N. Y. Supp. 782, 68 St. Rep. 716.

attack the transfer of the property to the mortgagee where it was intended to defraud them.⁴⁹

If the mortgagee takes the property, not by the voluntary act of the mortgagor in transferring the same, but by and under his mortgage, the creditors of the mortgagor may assail the title of the mortgagee though they did not recover judgments for their debts until after the mortgagee acquired the goods.⁵⁰

Sec. 3. Fraudulent Trust.

It is provided by statute that "a transfer of personal property, made in trust for the use of the person making it, is void as against the existing or subsequent creditors of such person."⁵¹ This statute does not vitiate a chattel mortgage given by a debtor to one of his creditors, though the surplus of the property, after satisfaction of the creditor's demand, is to be returned to the mortgagor.⁵² It is a customary provision of a chattel mortgage that the surplus shall be returned to the mortgagor.⁵³ The statute covers only passive trusts for the exclusive use of the grantor, or where the use of the grantor is the chief purpose, and has no application to trusts which are only incidental, and are expressed, or result to the use of the grantor, after the exercise of the pri-

49. *Delaware v. Ensign*, 21 Barb. 85; *Hills v. White*, 71 Hun 511, 24 N. Y. Supp. 1065.

50. *Mandeville v. Avery*, 124 N. Y. 376; *Dutcher v. Swartwood*, 15 Hun 31; *Sperry v. Baldwin*, 46 Hun 120; *Quinn, etc., Brewing Co. v. Hart*, 48 Hun 393, 1 N. Y. Supp. 388; *Hedges v. Polhemus*, 9 Misc. 680, 30 N. Y. Supp. 556.

51. Personal Property Law, § 34.

52. *Leitch v. Hollister*, 4 N. Y. 211; *Dunham v. Whitehead*, 21 N. Y. 131.

53. **Return of Surplus to Mortgagor.**—A chattel mortgage, given in good faith to secure the debt of

the mortgagee, is not brought within the condemnation of section 34 of the Personal Property Law by the fact that it contains an incidental provision that any surplus, after payment of the debt, shall be returned to the mortgagor. *Delaney v. Valentine*, 154 N. Y. 692.

A chattel mortgage given in trust to secure the payment of the mortgagor's debts, containing a provision that any surplus arising on the sale of the mortgaged property shall be turned over to the mortgagors, is valid. *Fidelity Trust & Guaranty Co. v. Bell*, 63 App. Div. 523, 71 N. Y. Supp. 651.

mary purpose, which is lawful.⁵⁴ A chattel mortgage given to a creditor to secure the debts of such creditor and certain other creditors of the mortgagor, though his property is not sufficient to pay all of his creditors, is not necessarily fraudulent or void by reason of the statute, where it was given and received in good faith without fraudulent intent on the part of either party.⁵⁵

Where the mortgagor reserves the power of disposing of the mortgaged property, so that the mortgage may be deemed fraudulent within the rules laid down in the preceding sections, often-times the arrangement is a fraudulent trust within section 34 of the Personal Property Law.⁵⁶ But the mere fact that the mortgage authorizes the mortgagor to retain possession of the mortgaged property until default does not show an unlawful trust.⁵⁷

Sec. 4. Fraudulent in Fact.

a. *In General.* — From earliest times, transfers of property made with the intent to delay, hinder or defraud the creditors of the owner, have been deemed void as to such creditors.⁵⁸ The rule is now embodied in section 35 of the Personal Property Law, providing: "Every transfer of any interest in personal property, or the income thereof, and every charge on such property or income, made with the intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered, with such intent, is void as against every person so hindered, delayed or defrauded."

To avoid the mortgage the creditor must show, not only the fraudulent purpose of the mortgagor, but that the mortgagee was a party to the fraud and took the mortgage with such unlawful

54. *Delaney v. Valentine*, 154 N.Y. 692.

55. *Delaney v. Valentine*, 154 N.Y. 692.

56. See *Spies v. Boyd*, 1 E. D. Smith 445.

57. *Hull v. Carnley*, 2 Duer 99; *rev'd on other grounds*, 11 N.Y. 501; *Fairbanks v. Bloomfield*, 5 Duer 434.

58. *Sturtevant v. Ballard*, 9 Johns. 337; *Look v. Comstock*, 15 Wend. 244. See also *Stewart v. Slater*, 6 Duer 83.

intent.⁵⁹ Thus, where a mortgage is made to two persons to secure separate and distinct debts, the knowledge and fraudulent intent of one will not affect the other; the mortgage will be sustained as to one and avoided as to the other.⁶⁰ Notice of the illegal intent of the mortgagor need not be established by positive proof, but may be inferred from the circumstances.⁶¹ Thus, where it appeared that the mortgagor was hopelessly insolvent to the knowledge of the mortgagee and was pressed by his creditors and about to abandon his business and that the mortgage was given for an antecedent debt and a certain amount of cash, the mortgagor refusing a check, upon all the available assets of the mortgagor, of double the value of the debt secured, it was held that the inference was reasonable that the mortgagor was turning his goods into cash to defraud his creditors, and in connection with other circumstances, the mortgage was held void as to creditors.⁶²

Where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and, while so concealing it, represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay his debts thus contracted, the mortgage will be declared fraudulent and void, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor.⁶³ Where a mortgage was executed by a judgment debtor to a third party while she was assuring the judgment creditor that, if he would delay the entering of the judgment for a few hours longer, she would pay the claim, it was held that the mortgage was fraudulent.⁶⁴

59. *Zoeller v. Riley*, 100 N. Y. 103; *Smith v. Post*, 1 Hun 516, 3 T. & C. 647; *Murphy v. Moore*, 23 Hun 95; *Hyde v. Bloomingdale*, 23 Misc. 1025.

60. *Smith v. Post*, 1 Hun 516, 3 T. & C. 647.

61. *Hyde v. Bloomingdale*, 23 Misc. 728, 51 N. Y. Supp. 1025.

62. *Hyde v. Bloomingdale*, 23 Misc. 728, 51 N. Y. Supp. 1025.

63. *Blennerhassett v. Sherman*, 105 U. S. 100.

64. *Robinson v. Hawley*, 45 App. Div. 287, 61 N. Y. Supp. 138.

An arrangement made by one whose property is about to be sold by virtue of a chattel mortgage, with another that the latter shall bid a certain amount for the property, and if he becomes the purchaser, shall give the mortgagor an undivided interest therein for the benefit of members of his family, on his paying an equal share of the purchase money, is neither a fraud upon creditors nor against public policy.⁶⁵

The question whether a chattel mortgage was given with the intent to defraud the creditors of the mortgagor is for the jury.⁶⁶

b. *Between Husband and Wife.* — A husband honestly indebted to his wife may give her a chattel mortgage to secure the debt, although he is at the time of executing it unable to pay his debts in full; and when it is found by the jury that the mortgage was given with honest intent, and not for the purpose of hindering, delaying or defrauding creditors, it is valid.⁶⁷ But dealings between a husband and wife which result in the appropriation of the husband's property for the payment of a debt claimed to be due to the wife, to the exclusion of other creditors, furnish uncommon opportunities for the perpetration of fraud, and are carefully and rigidly scrutinized.⁶⁸ Where a husband gave his wife a chattel mortgage to secure an actual indebtedness and it was found that the mortgage was not given to hinder, delay or defraud creditors, it was held that she could maintain an action for the conversion of the mortgaged property against one taking the same from her possession, though, as against her husband, the statute of limitations would have been a bar to the enforcement of a portion of the debt at the time of the execution of the mortgage.⁶⁹

c. *Excessive Statement of Indebtedness.* — The fact that the statement of the amount secured by a mortgage is incorrect does

65. *Bame v. Drew*, 4 Den. 287.

Y. 219; *Spaulding v. Keyes*, 125 N. Y. 113.

66. *Bishop v. Cook*, 13 Barb. 326.

68. *Stanley v. Nat. Union Bank*, 115 N. Y. 122; *Manchester v. Tibbets*, 121 N. Y. 219. See also *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159.

See section 37 of the Personal Property Law, providing: "The question of the existence of fraudulent intent in cases arising under this article is a question of fact and not of law."

69. *Manchester v. Tibbets*, 121 N. Y. 219.

67. *Manchester v. Tibbets*, 121 N.

not *per se* render the mortgage fraudulent.⁷⁰ But an overstatement of the sum is a badge of fraud and may afford, together with the other circumstances in the case, ground upon which the jury may find the mortgage fraudulent.⁷¹ If held fraudulent by reason of an excessive statement of the debt, it is not available to the mortgagee, even for the amount actually due.⁷²

Where a mortgage was executed by a husband to his wife for \$15,000, when he owed her only \$1,800, and when he knew that he was about to be made a defendant in a negligence suit, it was held that the mortgage was fraudulent, and not available to the mortgagee even to the extent of her *bona fide* claim.⁷³ Where a mortgagor in embarrassed circumstances gave a mortgage upon nearly all his property valued at from \$500 to \$600 to his brother-in-law conditioned for the payment of \$300, when there was in fact nothing due and the only liability was the signing by the mortgagee of a \$100 note with the mortgagor, it was held that the mortgage was fraudulent.⁷⁴

d. Effect of Consideration.—The consideration given for a chattel mortgage is always a highly important circumstance in ascertaining whether it was given in fraud of creditors,⁷⁵ but it is by no means conclusive. A mortgage may be held fraudulent though based upon a valuable consideration, for, to be valid, it is essential that it be also given in good faith.⁷⁶ Upon the other

70. *Miller v. Lockwood*, 32 N. Y. 293; *Frost v. Warren*, 42 N. Y. 204; *Walker v. Snediker*, Hoff. Ch. 145.

71. *McKinster v. Babcock*, 26 N. Y. 378; *Miller v. Lockwood*, 32 N. Y. 293; *Marsden v. Cornell*, 62 N. Y. 215; *Divver v. McLaughlin*, 2 Wend. 596.

72. *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159; *Johnson v. Philips*, 2 N. Y. Supp. 432. See also *Walker v. Snediker*, Hoff. Ch. 145.

73. *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159.

74. *Bailey v. Burton*, 8 Wend. 339.

75. *Proof of Consideration.*—In an action by a mortgagee of chattels against a sheriff who has levied an execution against the mortgagor thereof, where the defendant claims that the mortgage is fraudulent, it is not error to permit plaintiff to prove the consideration thereof. *Knapp v. Gregory*, 20 N. Y. Supp. 21.

76. *Blennerhassett v. Sherman*, 105 U. S. 100; *Billings v. Russell*, 101 N. Y. 226; *Hyde v. Bloomingdale*, 23 Misc. 728, 51 N. Y. Supp. 1025.

hand, it is expressly provided by statute that "a transfer or charge shall not be adjudged fraudulent as against creditors or purchasers, solely on the ground that it was not founded on a valuable consideration."⁷⁷ Thus, a mortgage, given upon the chattels of one person to secure a loan to another, is not necessarily fraudulent.⁷⁸

Sec. 5. Mortgage Fraudulent in Part.

Where a mortgage is deemed fraudulent as to a portion of the property secured thereby, as where the mortgagor is unlawfully authorized to dispose of a *part* of the goods, the entire mortgage is affected by the fraud.⁷⁹ And where a mortgage is fraudulent because a large portion of the indebtedness stated in the mortgage to be secured thereby is fictitious, the mortgage is fraudulent as to the *bona fide* indebtedness.⁸⁰ But where a mortgage is given by a mortgagor to two mortgagees with intent to defraud his creditors, it may be void as to one mortgagee who is a party to the fraudulent scheme and valid as to the one not participating in the fraud.⁸¹

Sec. 6. Who May Attack Fraudulent Mortgage.

a. *Creditors.* — A creditor at large of a mortgagor is not in a position to attack a mortgage given by his debtor; he must first procure a judgment and execution or some specific lien against the property.⁸² By attaching the property as that of the mort-

77. Personal Property Law, § 38. See *Pochell v. Read*, 20 App. Div. 208.

78. *Hincks v. Field*, 14 N. Y. Supp. 247, 37 St. Rep. 724, *aff'd*, 129 N. Y. 633, *mem.*

79. *Russell v. Winne*, 37 N. Y. 591; *Hedges v. Polhemus*, 9 Misc. 680, 30 N. Y. Supp. 556; *Mittnacht v. Kelley*, 3 Keyes 407; *Dodds v. Johnson*, 3 T. & C. 215. See also *Goodhue v. Berrien*, 2 Sandf. Ch. 630; *Spies v. Boyd*, 1 E. D. Smith 445.

80. *Levy v. Hamilton*, 68 App. Div. 277, 74 N. Y. Supp. 159; *Johnson v. Philips*, 2 N. Y. Supp. 432.

81. *Smith v. Post*, 1 Hun 516, 3 T. & C. 647.

82. *Skilton v. Codington*, 86 App. Div. 166, 83 N. Y. Supp. 351, *rev'd* on other grounds, 185 N. Y. 80.

A creditor at large cannot assail an assignment or other transfer of property by the debtor as fraudulent against creditors, but must first establish his debt by a judgment of a

gagor, he acquires a lien thereon and may impeach the title of the mortgagee.⁸³ Where the creditor has a mortgage to secure his debt, he may attack a prior mortgage upon the same property on the ground that it is fraudulent as to the creditors of the mortgagor.⁸⁴ If the creditor has levied upon personal property of his debtor under a valid judgment, he may bring a suit in equity in aid of his execution to procure an adjudication that a chattel mortgage upon such property is void as against his judgment.⁸⁵ And where the mortgagee takes possession of and sells the mortgaged property before the creditor obtains a judgment and execution against the same, the creditor can compel the mortgagee to account for the value thereof.⁸⁶

b. *Executor, Administrator, Assignee or Trustee.* — By virtue of section 19 of the Personal Property Law (formerly chapter 314 of the Laws of 1858) certain representative persons are authorized to assail mortgages fraudulent as against their beneficiaries. The statute provides as follows: "An executor, administrator, receiver, assignee or trustee, may, for the benefit of creditors or others interested in personal property, held in trust, disaffirm, treat as void and resist any act done, or transfer or agreement made in fraud of the rights of any creditor, including himself, interested in such estate, or property, and a person who fraudulently receives, takes or in any manner interferes with the personal

court of competent jurisdiction, and either acquire a lien upon the specific property, or be in a situation to perfect a lien, and subject it to the payment of his judgment upon the removal of the obstacle presented by the fraudulent assignment or transfer. *Southard v. Pinckney*, 5 Abb. N. C. 184.

Creditors of a husband cannot attack a mortgage executed by a husband and wife on the ground that it is fraudulent as to the creditors of the wife without showing that she had some creditors. *Bigelow v. Goble*, 9 App. Div. 391, 41 N. Y. Supp. 299.

83. Frost v. Mott, 34 N. Y. 253.

Justice's Court Judgment. — A creditor with a judgment rendered by a justice of the peace may attack a chattel mortgage given by his debtor, and may do so though the judgment is obtained upon attachment. *Bailey v. Burton*, 8 Wend. 339.

84. Anderson v. Hunn, 5 Hun 79.

85. Robinson v. Hawley, 45 App. Div. 287, 61 N. Y. Supp. 138.

86. Pfeiffer v. Roe, 108 App. Div. 54, 95 N. Y. Supp. 1014. See also *Murtha v. Curley*, 15 J. & S. 393.

property of a deceased person, or an insolvent corporation, association, partnership or individual is liable to such executor, administrator, receiver or trustee for the same or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim against the estate of such debtor, exceeding in amount the sum of one hundred dollars, may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in said estate, disaffirm, treat as void and resist any act done or conveyance, transfer or agreement made in fraud of creditors or maintain an action to set aside such act, conveyance, transfer or agreement. Such claim, if disputed, may be established in such action. The judgment in such action may provide for the sale of the property involved, when a conveyance or transfer thereof is set aside, and that the proceeds thereof be brought into court or paid into the proper surrogate's court to be administered according to law."⁸⁷

A suit may be brought by such a person for the benefit of creditors, though the creditors have not procured judgments upon their claims.⁸⁸

87. An administrator may disaffirm a chattel mortgage executed by his testator in fraud of creditors and maintain an action against the mortgagee for property taken by him under the mortgage. *Potts v. Hart*, 99 N. Y. 168.

The public administrator of a deceased insolvent mortgagor represents the creditors as well as the estate and may avoid a mortgage authorizing the mortgagor to sell the property for his own benefit. *Hangen v. Hochemeister*, 114 N. Y. 566.

An assignee for creditors may assail a mortgage under this statute. *Reynolds v. Ellis*, 103 N. Y. 115; *Ball v. Slafter*, 26 Hun 353, *aff'd*, 98 N. Y. 622; *Lain v. Sayer*, 50 App. Div. 554, 64 N. Y. Supp. 248.

A receiver in supplementary pro-

ceedings has the same right as a creditor to prosecute actions to set aside all transfers of property made by the debtor in fraud of creditors. The right of the receiver in this respect is not confined to the property fraudulently assigned; he may follow the proceeds of a sale thereof in the possession of any person not a *bona fide* holder or owner. *Mandeville v. Avery*, 124 N. Y. 376; *Hedges v. Polhemus*, 9 Misc. 680, 30 N. Y. Supp. 556.

A trustee in bankruptcy can avoid a fraudulent chattel mortgage given by the bankrupt. *Zartman v. First Nat. Bank*, 189 N. Y. 267; *Pfeiffer v. Roe*, 108 App. Div. 54, 95 N. Y. Supp. 1014; *Southard v. Pinckney*, 5 Abb. N. C. 184; *In re Hartman*, 185 Fed. 196.

88. Southard v. Benner, 72 N. Y. 424.

CHAPTER VIII.

RIGHTS AND REMEDIES OF MORTGAGOR.

SEC. 1. Transfer of Property.

- a. Before Default.
- b. After Default.
- c. Fraud in Not Disclosing Mortgage.
- d. Criminal Liability.

2. Possession of Property.

3. Action at Law.

- a. In General.
- b. Against Mortgagee.
- c. Damages.

4. Equity of Redemption.

5. Necessity of Tender in Action to Redeem.

6. Scope of Relief in Action to Redeem.

Sec. 1. Transfer of Property.

a. *Before Default.* — Before default a mortgagor may sell or mortgage the chattels, and the purchaser may hold the same subject to the mortgage.¹ Such a purchaser may again, before default, sell and deliver to another with the like effect, and in such case the remedy of the mortgagee, upon maturity of the mortgage debt, is to follow the property and recover it from the possession of the last purchaser.² If a second mortgagor who took his mortgage before default in the first, seizes the property under his mortgage after the mortgagor defaults in the first, he is liable to the latter for conversion.³

1. *Moore v. Prentiss Tool & Supply Co.*, 133 N. Y. 144; *Norton v. Shields*, 174 App. Div. 804, 161 N. Y. Supp. 880; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd on other grounds*, 52 N. Y. 185.

2. *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd on other grounds*, 52 N. Y. 185.

3. *Kleinberger v. Brown*, 26 J. & S. 4, 8 N. Y. Supp. 866.

b. *After Default.* — After default, the mortgagor loses all legal title to the mortgaged property; he cannot sell or mortgage it.⁴ But he may, even then, transfer his possession together with his equity of redemption.⁵ Even after the mortgagee has taken possession of the property, the mortgagor has a beneficial interest therein which he may convey.⁶

c. *Fraud in Not Disclosing Mortgage.* — A mortgagor of personal property may not always be bound, at the peril of being charged with fraud, to disclose whether the property is encumbered; the mortgagee may search the clerk's office and protect himself against prior mortgages. But, if the subsequent mortgagee, at the time of taking his mortgage, inquire of the mortgagor whether there are prior mortgages upon the property and the mortgagor falsely asserts that there are none, fraud may be predicated.⁷ And where a mortgagee, at the request of the mortgagor discharges his mortgage upon otherwise unencumbered property and takes in exchange a mortgage upon other property upon which a prior mortgage has been given and the mortgagor conceals the fact that such property has been mortgaged, the mortgagee may repudiate the satisfaction of his former mortgage on the ground of fraud.⁸

d. *Criminal Liability.* — The mortgagor by selling the mortgaged property without the consent of the mortgagee may render himself liable to criminal prosecution. Section 940 of the Penal Law provides: "A person who, having theretofore executed a mortgage of personal property, or any instrument intended to operate as such, sells, assigns, exchanges, secretes or otherwise disposes of any part of the property, upon which the mortgage or other instrument is at the time a lien, with intent thereby to

4. *Norton v. Shields*, 174 App. Div. 804, 161 N. Y. Supp. 880; *Huisen v. Walter*, 34 How. Pr. 385; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd on other grounds*, 52 N. Y. 185.

5. *Kitchen v. Lowery*, 127 N. Y. 53; *Tremaine v. Mortimer*, 128 N. Y. 1; *Farmers' Bank of Washington County v. Cowan*, 2 Abb. Dec. 88, 2

Keyes 217; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd on other grounds*, 52 N. Y. 185.

6. *Tremaine v. Mortimer*, 128 N. Y. 1.

7. *Lynch v. Tibbits*, 24 Barb. 51.

8. *Lynch v. Tibbits*, 24 Barb. 51.

defraud the mortgagee or a purchaser thereof, is guilty of a misdemeanor.”⁹

To secure a conviction under this section, it must be shown that the act of the defendant in disposing of the property was “with intent to defraud.”¹⁰ If the mortgagee gave the mortgagor absolute permission to sell the property, no conviction can be had; but where the permission was only to enable the mortgagor to pay the mortgage and the mortgagor, with fraudulent intent, planned to sell and convert the proceeds to his own use, he may be convicted.¹¹

Sec. 2. Possession of Property.

The right of the mortgagor to the possession of the mortgaged chattels as against the mortgagee is discussed in another place.¹² As against a third party, though the mortgage may be overdue, the mortgagor may be entitled to possession.¹³

Sec. 3. Action at Law.

a. *In General.* — A mortgagor, entitled to the possession of mortgaged property, may maintain an action for its recovery or for damages for its conversion, even against the mortgagee.¹⁴ Where the mortgagee has not insisted upon the possession of the mortgaged property, the mortgagor may maintain an action against a third party for the recovery of possession of the property, though he has defaulted in the payment of the mortgage.¹⁵

b. *Against Mortgagee.* — After default in the payment of the mortgage, the mortgagor has no legal rights in the mortgaged property and can, therefore, maintain no action at law against

9. See *People v. Durante*, 19 App. Div. 292, 45 N. Y. Supp. 1073.

7 St. Rep. 640; *Katz v. Diamond*, 16 Misc. 577, 38 N. Y. Supp. 766.

10. *People v. Staton*, 79 App. Div. 634, 80 N. Y. Supp. 2.

14. *Moore v. Prentiss Tool and Supply Co.*, 133 N. Y. 144.

11. *Millichamp v. People*, 14 Week. Dig. 252.

15. *Burns v. Winchell*, 44 Hun 261, 7 St. Rep. 640; *Katz v. Diamond*, 16 Misc. 577, 38 N. Y. Supp. 766.

12. See *infra*, the subdivision *Possession of Property*, p. 139.

See also *Livor v. Orser*, 5 Duer 501.

13. *Burns v. Winchell*, 44 Hun 261,

the mortgagee; his only remedy is in an action to redeem the mortgage.¹⁶ He cannot sue the mortgagee for damages on the ground that the latter has made a wrongful or unfair sale of the property.¹⁷ But where there is a surplus arising from the sale of the property, it may be recovered in an action at law.¹⁸ Where the property mortgaged is a chose in action, as an insurance policy upon the life of the mortgagor, upon his death and the collection of the insurance funds by the mortgagee, the representatives of the mortgagor may maintain an action at law to recover the difference between such funds and the indebtedness.¹⁹

16. *Casserly v. Witherbee*, 119 N. Y. 522; *Darrow v. Wendelstadt*, 43 App. Div. 426, 60 N. Y. Supp. 174; *Cody v. First Nat. Bank*, 63 App. Div. 199, 71 N. Y. Supp. 277; *De Luca v. Archer Mfg. Co.*, 49 Misc. 645, 97 N. Y. Supp. 1026; *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546; *Stoddard v. Denison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Rudemien v. Bershadsky*, 121 N. Y. Supp. 595; *Brush v. Evans*, 21 J. & S. 523; *Rogers v. Traders' Ins. Co.*, 6 Paige 583. See also *Pettit v. King*, Seld. Notes 208; *Michelson v. Fowler*, 27 Hun 159.

The refusal of the tender of a debt made after the default, and the subsequent sale of the chattels by the mortgagee, do not entitle the mortgagor to maintain an action at law for the conversion of the chattels; his remedy, if any, is by suit in equity. *Darrow v. Wendelstadt*, 43 App. Div. 426, 60 N. Y. Supp. 174.

Where the vendee of a business has secured the payment of the purchase price by a chattel mortgage and subsequently abandons the business and refuses to pay the rent of the

premises, he cannot hold the mortgagee for conversion in taking possession of the property, where he had that right under the mortgage. *Longenecker v. Kuhn*, 126 App. Div. 254, 110 N. Y. Supp. 517.

17. *Stoddard v. Denison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309.

18. See *infra*, the subdivision *Surplus*, p. 155.

19. *King v. Van Vleck*, 109 N. Y. 363, *aff'g* 40 Hun 68. See also *Matthews v. Sheehan*, 69 N. Y. 585.

Where the mortgagee received the amount of a mortgaged insurance policy upon the death of the mortgagor thereof, though after default, he not having taken any steps to cut off the equity of redemption, the acceptance of the sum due on the policy is a satisfaction of the debt which obviates the necessity of the representatives of the deceased mortgagor taking steps to enforce the right to redeem. As to any surplus he is regarded as the debtor of the person succeeding to the rights of the mortgagor and recovery may be had as for money had and received. *King v. Van Vleck*, 40 Hun 68, *aff'd*, 109 N. Y. 363.

If the mortgagee takes the property before default when he has no right so to do, as where he assumes to take it under the "danger clause," when he does not in good faith deem himself unsafe,²⁰ or where a demand for the return of the property is necessary before seizure and no demand is made,²¹ the mortgagor may recover the property or its value of the mortgagee. Or, if the mortgage is discharged as to certain articles originally covered, the mortgagee will be liable for conversion if he takes the same.²²

c. *Damages.* — In an action before default by the mortgagor against the mortgagee for the conversion of the property, the damages recoverable are the value of the property less the amount of the debt.²³ But, where the action is against a stranger, the mortgagor can recover the whole value.²⁴

Sec. 4. Equity of Redemption.

Even after default the mortgagor has an equity of redemption in the mortgaged property which permits him to maintain a suit in equity for the redemption of the property.²⁵ This right is assignable,²⁶ and, upon the mortgagor's death, passes to his repre-

20. *Darling v. Hunt*, 46 App. Div. 631, 61 N. Y. Supp. 278; *Stage v. Van Leuven*, 77 App. Div. 646, 78 N. Y. Supp. 960.

21. *Pugh v. Kraft*, 126 N. Y. Supp. 162; *Newsam v. Finch*, 25 Barb. 175.

22. *Clark v. Griffith*, 24 N. Y. 595.

23. *Fischman v. Levin*, 83 Misc. 107, 144 N. Y. Supp. 674; *Russell v. Butterfield*, 21 Wend. 300.

24. *Russell v. Butterfield*, 21 Wend. 300.

25. *West v. Crary*, 47 N. Y. 423; *Porter v. Parmley*, 52 N. Y. 185; *People v. Remington & Sons*, 59 Hun 282, 12 N. Y. Supp. 824, *aff'd*, 126 N. Y. 654, *mem.*; *Fishel v. Hamilton Storage Warehouse Co.*, 42 Misc. 532, 86 N. Y. Supp. 196; *Charter v. Stevens*, 3 Denio 33; *Pratt v. Stiles*,

17 How. Pr. 211, 9 Abb. Pr. 150; *Hulsen v. Walter*, 34 How. Pr. 385; *Randall v. Dunbar*, 14 Week. Dig. 332.

26. *Tremaine v. Mortimer*, 128 N. Y. 1.

Assignable. — The equity of redemption is assignable and passes under a general assignment for creditors. *Kitchen v. Lowery*, 127 N. Y. 53.

Receiver of Corporation. — The equity of redemption owned by a corporate mortgagor passes to its receiver upon its dissolution. *Matter of Schuyler's Steam Tow Boat Co.*, 64 Hun 384, 18 N. Y. Supp. 89, *aff'd*, 46 St. Rep. 963, 19 N. Y. Supp. 565, *aff'd*, 48 St. Rep. 830, *rev'd* on other grounds, 154 U. S. 256.

sentatives.²⁷ It is lost by a foreclosure of the mortgage,²⁸ by a valid sale under the power of sale,²⁹ or by lapse of time.³⁰ A sale of the property after default to a third person with the mortgagor's consent is equivalent to a formal foreclosure of the equity.³¹ The right, however, cannot be waived or lost by a stipulation made at the time the contract is entered into, even if embodied in the instrument.³²

A receiver in supplementary proceedings may maintain an action to redeem property from a mortgage executed by the judgment debtor. *Bunacleugh v. Poolman*, 3 Daly 236.

27. *King v. Van Vleck*, 40 Hun 68, *aff'd*, 109 N. Y. 363; *Fox v. Burns*, 12 Barb. 677.

28. *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291; *Stoddard v. Denison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309. See also *supra*, the subdivision *Foreclosure by Action*, p. 156.

29. *Bragelman v. Dane*, 69 N. Y. 69; *Casserly v. Witherbee*, 119 N. Y. 522; *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291; *Bunacleugh v. Poolman*, 3 Daly 236; *Stoddard v. Dennison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Patchin v. Pierce*, 12 Wend. 61. See also *supra*, the subdivision *Foreclosure by Sale of Chattels*, p. 153.

30. *Stoddard v. Denison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309. See also *King v. Van Vleck*, 40 Hun 68, *aff'd*, 109 N. Y. 363.

An action to redreeem must be brought within a reasonable time. *Pratt v. Stiles*, 17 How. Pr. 211, 9 Abb. Pr. 150; *Halstead v. Swartz*, 4 T. & C. 559, 46 How. Pr. 289.

31. *Talman v. Smith*, 39 Barb. 390.

32. *Hughes v. Harlan*, 166 N. Y. 427, 432, *aff'g* 37 App. Div. 528, 55

N. Y. Supp. 1106; *Clark v. Henry*, 2 Cow. 324; *Bunacleugh v. Poolman*, 3 Daly 236.

The right of redemption does not depend upon the agreement of the parties. It is something independent and irrespective of the parties, which the law gives and which it does not permit them, even by agreement, to take from the mortgagor. *Hughes v. Harlan*, 37 App. Div. 528, 55 N. Y. Supp. 1106, *aff'd*, 166 N. Y. 427.

"Equity will not allow the mortgagor to clog the equity of redemption with any by-agreement, and will not uphold any oppressive arrangement or advantage exacted by the mortgagee at the time of the loan of the money." *Hall v. Ditson*, 5 Abb. N. C. 198.

The right to redeem is carefully protected by courts of equity. They will not suffer an agreement to prevail, that the estate shall become an absolute purchase in the mortgagee, upon any event whatever. The reason of the rule is, because it puts the borrower too much in the power of the lender, who being distressed at the time is generally too much inclined to submit to any terms. There is no exception to the rule, "once a mortgage, and always a mortgage." No agreement of the parties can affect the doctrine as to redemption in a court of equity. *Clark v. Henry*, 2 Cow. 324.

Sec. 5. Necessity of Tender in Action to Redeem.

A tender of the amount due upon a chattel mortgage is not necessary to entitle the owner of the equity to maintain an action of redemption nor is it necessary for him to offer in the complaint to pay the sum due. The tender and offer are important only as bearing upon the question of costs. The mortgagee's rights are protected by a provision in the judgment directing the payment of the debt as a condition of the relief.³³

Sec. 6. Scope of Relief in Action to Redeem.

In an action for redemption, the owner of the equity of redemption may have such incidental relief as is necessary. He may have an accounting to determine the amount due upon the mortgage and judgment giving him the right to redeem upon the payment of that amount.³⁴ If the mortgagee has disposed of the property or otherwise prevented a redemption, reparation may be made in damages.³⁵ The mortgagee may be compelled to account for the rents and profits of the property while he had possession thereof.³⁶ But where the mortgagee has disposed of the property and the relief of the mortgagor is confined to damages amounting to the value of the property when the mortgagee took the same, the mortgagor is not entitled to further damages in the nature of rents and profits of the property.³⁷ The mortgagor is not entitled to a judgment

33. *Casserly v. Witherbee*, 119 N. Y. 522. See also *Cartier v. Pabst Brewing Co.*, 112 App. Div. 419, 98 N. Y. Supp. 516.

Earlier Decisions.—In earlier cases, the view was entertained that actual tender of the debt or an offer in the complaint to pay the same was essential. See *Hall v. Ditson*, 5 Abb. N. C. 198; *Stoddard v. Denison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Brush v. Evans*, 21 J. & S. 523. See also *De Luca v. Archer Mfg. Co.*, 49 Misc. 645, 97 N. Y. Supp. 1026. And, where the default was in one installment, that a tender or offer to pay the whole debt

was necessary. See *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037; *Halstead v. Swartz*, 1 T. & C. 559, 46 How. Pr. 289.

34. *Casserly v. Witherbee*, 119 N. Y. 522.

35. *Stoddard v. Denison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309.

36. *Pratt v. Stiles*, 17 How. Pr. 211, 9 Abb. Pr. 150.

37. *Cutler v. James Goold Co.*, 43 Hun 516, where the court explained its view as follows: "In an action for redemption of property, real or personal, the plaintiff may recover the rents and profits of the property,

in the form of money damages which compels the mortgagee to become a purchaser of the mortgaged property at a valuation fixed by the court.³⁸

Where a real estate mortgage is assigned as security for a debt under such circumstances that the transaction is a mortgage, and the assignee subsequently forecloses the real estate mortgage and bids in the property for less than the amount due him, the assignee, upon receiving the amount of his debt and interest, may be compelled to convey the real estate to the assignor.³⁹

or, what is the same thing, for the use of it during the time he is deprived of such use, but this is because he recovers the property itself, and if personal property it may be depreciated in value. But here the recovery is not of the property, or of its value at the time of the trial or judgment. The plaintiff recovers the value as of the time it was taken from the possession of the plaintiff. In an action where the plaintiff recovers the value of property as of the time of

the trial, or when by the judgment he may be required to take the property, the reason applies which may enable him to recover as damages the value of the use of which he has been by the defendant deprived, when there is a value in its use."

38. *Bragelman v. Dane*, 69 N. Y. 69; *Casserly v. Witherbee*, 119 N. Y. 522; *Cartier v. Pabst*, 112 App. Div. 419, 98 N. Y. Supp. 516.

39. *Hoyt v. Martense*, 16 N. Y. 231; *Slee v. Manhattan Co.*, 1 Paige 48.

CHAPTER IX.

RIGHTS AND REMEDIES OF MORTGAGEE.

- SEC. 1. When Mortgagor Deemed in Default.**
 - a. In General.
 - b. Mortgage to Indemnify Surety.
 - c. Failure to Pay Installment.
 - d. When Process against Mortgaged Property Is Permitted.
 - e. When Property Is Removed Without Mortgagee's Consent.
 - f. Extension of Time.
 - g. Waiver of Default.
- 2. Possession of Property.**
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- 4. Retention of Property Without Foreclosure.**
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 - b. Liability of Purchaser from Mortgagor.
 - c. Liability of Agent of Mortgagor.
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- 7a. Action Against Mortgagor for Impairment of Security.**
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SEC. 9. Foreclosure by Action.

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- f. Application of Foregoing Sections.

11. Action for Deficiency.

12. Action in Equity to Determine Priority.

13. Jurisdiction of Municipal Court of New York in Actions to Enforce Mortgage.

Sec. 1. When Mortgagor Deemed in Default.

a. *In General.*—The mortgagor is in default if he permits the time appointed for payment to pass without making the required payment. The title of the mortgagee to the mortgaged property then becomes absolute, leaving the mortgagor a mere equity of redemption.¹ Where no time is specified in the mortgage for the payment of the debt, it is payable immediately and no demand is necessary before taking possession or foreclosing the mortgage.² Where the mortgage specifies an impossible time for payment, in legal effect it is the same as though no time is specified, and it is due immediately.³ Thus, where a mortgage was dated in 1837, but appointed a day in 1830 for payment, it was held that it was payable immediately.⁴ Where a mortgage expresses no time of payment, a clause providing that the mortgagor may remain in possession of the property until default does not render a demand necessary.⁵

1. *Baumann v. Cornez*, 15 Daly 450, 8 N. Y. Supp. 480.

2. *Stearns v. Oberle*, 47 Misc. 349, 94 N. Y. Supp. 37; *Baltes v. Ripp*, 1 Abb. Dec. 78, 3 Keyes 210; *Dikeman v. Puekhafer*, 1 Abb. Pr., N. S., 32, 1 Daly 489; *Howland v. Willett*, 3 Sandf. 607.

Evidence of a parol agreement that a mortgage, specifying no date of payment, was not to be payable immediately is not admissible. *Baltes v. Ripp*, 1 Abb. Dec. 78, 3 Keyes 210.

See also *Fuller v. Acker*, 1 Hill 473. Nor is evidence admissible to show that payment of a mortgage payable on demand was by a contemporaneous parol agreement not to be demanded so long as the mortgagor performed certain agreements. *Kelley v. Ruppert*, 173 App. Div. 116, 159 N. Y. Supp. 366. See generally Chamberlayne's Modern Law of Evidence.

3. *Fuller v. Acker*, 1 Hill 473.

4. *Fuller v. Acker*, 1 Hill 473.

5. *Howland v. Willett*, 3 Sandf. 607.

Where a mortgage is payable upon demand, the title to the mortgaged property becomes absolute in the mortgagee upon a demand.⁶ Though a demand may be necessary as between the parties to a mortgage payable on demand, it is not a necessary prerequisite to an action to recover the property from one wrongfully taking the same.⁷ A mortgage payable one day after its date is not payable on demand, and no demand is necessary before the commencement of an action to recover possession of the mortgaged property.⁸

b. *Mortgage to Indemnify Surety.* — A mortgage given to protect a surety or an indorser of commercial paper is usually drawn so that it becomes due when the principal debtor defaults in his obligation and the mortgagee is not obliged to wait until he is actually compelled to pay the obligation before he can foreclose the mortgage.⁹ If the creditor extends the time of payment of the obligation and thereby discharges the surety from liability thereon, the surety cannot take the mortgaged property upon the failure of the mortgagor to perform the obligation.¹⁰

c. *Failure to Pay Installment.* — Where default is made in the payment of one installment of a mortgage payable in installments, and the mortgage provides that, upon default in one

6. *Hulsen v. Walter*, 34 How. Pr. 385.

7. *Brown v. Cook*, 3 E. D. Smith 123.

8. *Brockman v. Buell*, 16 Daly 90, 9 N. Y. Supp. 895.

9. *Chapman v. Jenkins*, 31 Barb. 164. See also *Grant v. Smith*, 88 Hun 32, 34 N. Y. Supp. 538.

A chattel mortgage given to indemnify a surety upon an undertaking in an action against loss or damage, and conditioned that it should be void when the mortgagor should pay the damages, etc., that should be adjudged against him, and providing that the mortgagee, "if he should deem himself in danger of losing the said debt, by delaying the collection thereof until the expiration of the time limited for the pay-

ment thereof," might take possession, etc., authorizes the mortgagee to take possession before any liability upon the undertaking has accrued. *Filkins v. Cruice*, 21 Week. Dig. 292.

Where a surety for the payment of rent reserved in a lease takes from the lessee a chattel mortgage to secure him from loss by reason of his liability as surety, and he is subsequently obliged to pay the rent due upon the lease, this divests the mortgagor of all legal property or interest in the chattels mortgaged, and the mortgagee becomes the absolute legal owner thereof. *Swift v. Hart*, 12 Barb. 530.

10. *Newsam v. Finch*, 25 Barb. 175.

installment, the mortgage debt shall become due, the mortgagee may seize the property or otherwise enforce the mortgage.¹¹ But where the mortgage does not become due upon the default in the payment of one installment and the right to enforce the mortgage is not given the mortgagee until the maturity of the entire debt, though the mortgagee might sue to recover the installment, he is not in a position to enforce the default by a seizure of the property or foreclosure of the mortgage merely because the mortgagor has defaulted in one installment.¹²

If the mortgagor is in default by failure to pay one installment, he cannot redeem without a tender of the whole debt,¹³ though by a tender and acceptance of the unpaid installment the forfeiture is waived and the mortgagor resumes his original status under the mortgage.¹⁴

d. When Process against Mortgaged Property Is Permitted. — A chattel mortgage sometimes contains a clause to the effect that if execution is levied against the mortgaged property or if the mortgagor suffers or permits an attachment to be levied against such property, the mortgage shall thereupon become due and enforceable.¹⁵ Such a clause is valid, and, when an officer levies

11. *Bauman v. Cornez*, 15 *Daly* 450, 8 N. Y. Supp. 480; *Furman v. Melnick*, 154 N. Y. Supp. 100. See also *Leadbetter v. Leadbetter*, 125 N. Y. 292, *aff'g* 32 St. Rep. 890.

12. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037; *Abramson v. Potts*, 69 Misc. 64, 125 N. Y. Supp. 1012.

Rights of Mortgagor. — Where a chattel mortgage gives the mortgagee the right to take possession of the property only on default in the payment of the sum secured thereby and contains no clause making the whole sum due on default in the payment of one installment, the property, while in the possession of the mortgagor, though he is in default in the payment of one installment, may be sold under an execution against him sub-

ject to the rights of the mortgagee. *Corrigan v. Sammis*, 65 Misc. 473, 120 N. Y. Supp. 69.

Earlier Cases. — The earlier cases are not in harmony with the rule stated in the text and supported by the above cases. See *Robinson v. Wilcox*, 2 Leg. Obs. 160; *Phenix Nat. Bank v. Cleveland*, 11 N. Y. Supp. 873, 34 St. Rep. 498; *Van Loon v. Willis*, 13 *Daly* 281; *Halstead v. Swartz*, 1 T. & C. 559, 46 How. Pr. 289; *Pulver v. Richardson*, 3 T. & C. 436.

13. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037.

14. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037.

15. See *Grant v. Smith*, 88 Hun 32, 34 N. Y. Supp. 538.

upon the property under such process, the right to the possession of the goods vests in the mortgagee and he is entitled thereto as against the officer.¹⁶ A clause of such nature generally refers to process against the *mortgaged* chattels and the mortgage does not become due by a levy upon property of the mortgagor not covered by the mortgage.¹⁷ Where a mortgage contained a clause that, if the mortgagor permitted judgment to be entered against him, the mortgage would become due and the mortgagee would have the right to take the property and sell it on five days' notice, it was held that the five days' notice was not necessary to perfect the default, but simply applied to the time of sale.¹⁸

e. *When Property Is Removed Without Mortgagee's Consent.* — A stipulation in a chattel mortgage that, upon the removal or disposition of the mortgaged property without the consent of the mortgagee, the mortgage shall become due and enforceable is valid.¹⁹ An attachment of the mortgaged property without the connivance of the mortgagor is not a sale or disposal thereof within the meaning of a clause providing that, if the mortgagor sells or in any way disposes of the goods, the mortgagee may take the same and keep them until default in payment.²⁰ Where there was a provision in a mortgage that the mortgagor could remain in possession until default in payment, unless he or some other person attempted to sell, assign, remove or otherwise dispose of the property, it was held that the seizure of the property before default on a distress warrant for rent due from the mortgagor entitled the mortgagee to possession.²¹

f. *Extension of Time.* — The time for the payment of the mortgage may be extended by the mortgagee, but an extension to be binding must be founded upon a legal consideration.²² A mere

16. *Bryan v. Smith*, 13 Daly 331.

Grant v. Smith, 88 Hun 32, 34 N. Y.

17. *Robertson v. Ongley Electric*

Supp. 538.

Co., 146 N. Y. 20.

20. *Carpenter v. Town*, Hill & D.

18. *Leadbetter v. Leadbetter*, 125

Supp. 72.

N. Y. 290.

21. *Conkey v. Hart*, 14 N. Y.

19. *Russell v. Butterfield*, 21 Wend.

22.

300; *Baumann v. Cornez*, 15 Daly 450, 8 N. Y. Supp. 480. See also

22. *Repelow v. Walsh*, 98 App. Div. 320, 90 N. Y. Supp. 651.

promise to extend the time of payment is not a bar to the foreclosure of the mortgage prior to the expiration of such extended time.²³ The refiling of the mortgage after it has become due does not operate as an extension of time or prevent the mortgagee from insisting upon the forfeiture.²⁴ The mortgagee does not extend the time of payment by retaining the property without selling the same.²⁵

g. *Waiver of Default.* — Upon default in payment, the mortgagor forfeits his legal title to the mortgaged chattels. The mortgagee may, however, waive such forfeiture. The mortgagee after default is not obliged to accept a tender of the debt; he may insist upon the forfeiture.²⁶ But, if he accepts the tender, the forfeiture is waived, and the mortgagee's title to the mortgaged property is extinguished.²⁷ If the mortgage becomes due on account of the failure to pay an installment of the debt, the mortgagee waives the forfeiture if he accepts the installment due, though, to redeem, the mortgagor might be compelled to tender the entire debt. By waiving a forfeiture of this character, the parties are placed in the same position as before the maturity of the installment.²⁸ By demanding the payment of past-due installments, the mortgagee waives the forfeiture.²⁹ But a refiling of the mortgage after default is not a waiver.³⁰

Sec. 2. Possession of Property.

a. *Before Default.* — In the absence of a clause in a chattel mortgage which can be construed to allow the mortgagor to retain

23. *Repelow v. Walsh*, 98 App. Div. 320, 90 N. Y. Supp. 651.

24. *Dane v. Mallory*, 16 Barb. 46; *Fuller v. Acker*, 1 Hill 473.

25. *Burdick v. McVanner*, 2 Denio 170.

26. See *infra*, the section *Discharge — By Tender After Default*, p. 182.

27. *West v. Crary*, 47 N. Y. 423; *Charter v. Stevens*, 3 Denio 33; *Patchin v. Pierce*, 12 Wend. 61.

Acceptance of Part. — An accept-

ance of a portion of the debt after forfeiture is not a waiver thereof. *Patchin v. Pierce*, 12 Wend. 61.

28. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037.

29. *Van Loan v. Willis*, 13 Daly 281; *Baumann v. Cornez*, 15 Daly 450, 8 N. Y. Supp. 480.

30. *Dane v. Mallory*, 16 Barb. 46; *Fuller v. Acker*, 1 Hill 473; *Hulsen v. Walter*, 34 How. Pr. 385.

possession of the mortgaged property, the right to possession follows the legal title, and is, therefore, in the mortgagee.³¹ But, as a practical proposition, a mortgage is seldom drawn which does not contain some provision authorizing the mortgagor to retain possession.³² Thus, a "danger clause," permitting the mortgagee to take possession at any time he deems himself unsafe, by implication, gives the mortgagor the right of possession until default or until the mortgagee exercises his right under such clause.³³ Where the mortgage contains a provision giving the mortgagee the right to take possession of the chattels in case of non-payment at maturity, a stipulation may be implied that the mortgagor shall have possession until such time.³⁴ In some mortgages, the mortgagor is expressly given the right of possession

31. *Parish v. Wheeler*, 22 N. Y. 494; *Rich v. Milk*, 20 Barb. 616; *Shuart v. Taylor*, 7 How. Pr. 251.

32. See *Matthews v. Victor Hotel Co.*, 132 N. Y. Supp. 375.

Where the mortgagor has possession and control of the property, this is *prima facie* evidence of a right to the possession; and if a third person seeks to impeach that right he must produce the evidence by which it would appear that the possession is wrongful, or that the right has been diverted according to law. *Rogers v. King*, 66 Barb. 495.

33. *Hall v. Sampson*, 35 N. Y. 274. Compare *Rich v. Milk*, 20 Barb. 616; *Chadwick v. Lamb*, 29 Barb. 518.

Explanation of Rule.—The mortgage specifically defined the circumstances under which the grantee should become entitled to the right of possession; and this evinces the mutual intent of the parties, that, until it vested in the mortgagee, it should remain in the mortgagor. His possessory right was to terminate on failure to pay the debt at the time named, or at such earlier time as

might be fixed by the election of the mortgagee, if, in good faith, he should deem himself insecure. *Hall v. Sampson*, 35 N. Y. 274.

34. See *Farrell v. Hildreth*, 38 Barb. 178.

Payable in Installments.—Where a chattel mortgage gives the mortgagee the right to take possession of the mortgaged property only on default in the payment of the sum secured thereby and contains no clause making the whole sum due on default in the payment of an installment, the mortgagor is entitled to the possession thereof, though he is in default in the payment of one installment. *Corrigan v. Sammis*, 65 Misc. 473, 120 N. Y. Supp. 69.

Where a chattel mortgage, given as security for a number of notes, simply provides that, in case default shall be made in the payment of the principal sum, it shall be lawful for the mortgagee to seize the property, the mortgagee is not entitled to seize the property until the last note becomes due. *Abramson v. Potts*, 69 Misc. 64, 125 N. Y. Supp. 1012.

until default in the mortgage.³⁵ Under such a mortgage an injunction may be procured to prevent the mortgagee from taking possession before such time.³⁶

b. *After Default.*—Upon the default of the mortgagor, the mortgagee, by virtue of his absolute title to the mortgaged chattels, is entitled to the possession thereof.³⁷ He may take the property from the mortgagor or any one claiming under the mortgagor whose rights are not superior.³⁸ The right of possession is not

35. *Van Hassell v. Borden*, 1 Hilt. 128; *Redman v. Hendricks*, 1 Sandf. 32.

Provision Is Lawful.—A provision in a mortgage permitting the mortgagor to retain possession of the mortgaged chattels until default in payment does not render the mortgage void, but gives the mortgagor a legal right of possession during the period so limited, and the mortgagee has no right to interfere with or disturb the possession of the mortgagor. *Fairbanks v. Bloomfield*, 5 Duer 434.

36. *Ford v. Ransom*, 8 Abb. Pr., N. S., 416.

37. *Judson v. Easton*, 58 N. Y. 664; *Bragelman v. Dane*, 69 N. Y. 19; *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291; *Longenecker v. Kuhn*, 126 App. Div. 254, 110 N. Y. Supp. 517; *Shelton v. Holzwasser*, 46 Misc. 76, 91 N. Y. Supp. 328; *Hazlett v. Hamilton Storage & Warehouse Co.*, 47 Misc. 660, 94 N. Y. Supp. 580; *Kraus v. Black*, 56 Misc. 641, 107 N. Y. Supp. 609; *Phenix Nat. Bank v. Cleveland Co.*, 11 N. Y. Supp. 873, 34 St. Rep. 498; *Keefer v. Greene*, 16 N. Y. Supp. 498; *Fidelity Loan Assoc. v. Connolly*, 92 N. Y. Supp. 252; *Rudeman v. Bershadsky*, 121 N. Y. Supp. 595; *Talman v. Smith*, 39 Barb.

390; *Fairbanks v. Bloomfield*, 5 Duer 434; *Fuller v. Acker*, 1 Hill 473; *Porter v. Parmley*, 43 How Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd* on other grounds, 52 N. Y. 185; *Reuscher v. Klein*, 3 J. & S. 446; *Bryant v. Woodruff*, 5 Leg. Obs. 139; *Patchin v. Pierce*, 12 Wend. 61.

When the mortgagor makes default the mortgagee becomes the absolute owner of the chattels and entitled to the immediate possession thereof; and he is entitled to assume the possession at once, taking it from any one who holds the chattels by any title subordinate to his mortgagor. *Hazlett v. Hamilton Storage and Warehouse Co.*, 47 Misc. 660, 94 N. Y. Supp. 580.

Upon the breach of the covenants in a chattel mortgage, the title of the property mortgaged becomes that of the mortgagee, subject only to the right of redemption; and the mortgagee may take possession of the property at any time after default without a prior demand. *Kraus v. Black*, 56 Misc. 641, 107 N. Y. Supp. 609.

38. *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd* on other grounds, 52 N. Y. 185. And see cases cited above.

affected by the fact that the mortgagor has moved from his residence and stored the goods on the premises of a third person, as the mortgagee is entitled to the goods as much in one place as in another.³⁹ If the right of the mortgagor to the possession of the property expires and the right of the mortgagee thereto commences while the goods are the subject of a levy under execution or attachment against the mortgagor, the mortgagee is entitled to claim the property and the officer is guilty of conversion if he withholds the same; the mortgagee is under no obligation to pay or tender the costs and expenses of the process.⁴⁰

c. *Waiver of Right.* — The mortgagor may waive his right to the possession of the property or may waive a condition precedent to the right of the mortgagee to acquire possession thereof.⁴¹ The mortgagee also may waive his right to the possession of the property.⁴² The latter's right, however, is not waived by the acceptance of payments on the mortgage at other times than the days specified in the mortgage for that purpose.⁴³

Sec. 3. Rights of Mortgagee under "Danger Clause."

It is common practice to insert in a chattel mortgage a clause authorizing the mortgagee, at any time he deems himself unsafe, to take possession of the property and sell the same previous to the time mentioned for the payment of the debt. Such a provision is known as a "danger clause." It is a valid provision and authorizes the mortgagee to take the property at any time he in good faith deems himself unsafe.⁴⁴ If he is justified in taking the property, he acquires an absolute title thereto the same as though the debt were due and the mortgagor in default.⁴⁵ But the mortgagee must act in good faith;⁴⁶ he cannot take the property

39. *Keefer v. Greene*, 16 N. Y. Supp. 498.

40. *Fairbanks v. Bloomfield*, 5 Duer 434.

41. *Nichols v. Mase*, 94 N. Y. 160.

42. See *supra*, the section *Waiver of Default*, p. 139.

43. *Kraus v. Black*, 56 Misc. 641, 107 N. Y. Supp. 609.

44. *Smith v. Post*, 1 Hun 516, 3 T. & C. 647; *Chadwick v. Lamb*, 29 Barb. 518; *Farrell v. Hildreth*, 38 Barb. 178.

45. *Huggans v. Fryer*, 1 Lans. 276.

46. *Darling v. Hunt*, 46 App. Div. 631, 61 N. Y. Supp. 278; *Oppenheimer v. Moore*, 107 App. Div. 301, 95 N. Y. Supp. 138; *Mitchell v. Dane*, 129 N. Y. Supp. 404.

maliciously or merely because he wanted or needed the money.⁴⁷ If the mortgagee takes the property under such a clause, it is presumed that he in good faith deemed himself unsafe,⁴⁸ and it is incumbent upon the mortgagor, or person assailing the mortgagee's right, to show the want of good faith.⁴⁹ If there is any evidence upon the question it becomes a question of fact for the jury to determine whether the mortgagee did in reality feel insecure, or whether it was a mere pretense for the purpose of enforcing payment of the debt before maturity.⁵⁰

Where a chattel mortgage for \$100 was given on a horse and a growing crop of wheat, and the horse was worth not more than \$50, and the crop, proving a failure, was sold to the mortgagee for \$10, it was held that the mortgagee was justified in taking possession of the horse under the danger clause, the day after the sale of the wheat.⁵¹ Where it appeared that a mortgagor of furniture had sublet the premises to another tenant who had been dispossessed by the landlord and the mortgagor had said that the property had been removed but she did not know where it was except that it had been taken charge of by friends, and she also had said that she did not have money enough to pay her moving expenses and had attempted to borrow money from the mortgagee, it was held that the assignee of the mortgage was justified in foreclosing under the danger clause.⁵² If the mortgagor absconds and an attachment is levied against the property the mortgagee clearly has a right to take steps to secure possession of the property.^{52a}

In the absence of any finding of fact tending to show that the mortgagee did not act in good faith in making a seizure of the property under the danger clause or that he did not deem himself in danger of a loss, a finding by the court that the seizure and detention was wrongful is unwarranted, and especially so when inconsistent with the facts found. *Filkins v. Cruice*, 21 Week. Dig. 292.

47. *Hyer v. Sutton*, 59 Hun 40, 12 N. Y. Supp. 378; *Darling v. Hunt*, 46 App. Div. 631, 61 N. Y. Supp. 278.

48. *Smith v. Post*, 1 Hun 516, 3 T. & C. 647.

49. *Stage v. Van Leuvan*, 77 App. Div. 646; 78 N. Y. Supp. 960. See also *Champagne v. Powell Medicine Co.*, 48 App. Div. 314, 63 N. Y. Supp. 26.

50. *Hawver v. Bell*, 19 N. Y. Supp. 612, 46 St. Rep. 447, *aff'd*, 141 N. Y. 140.

51. *Allen v. Vose*, 34 Hun 57.

52. *Mitchell v. Dane*, 129 N. Y. Supp. 404.

52a. *Crutts v. Daly*, 84 Misc. 192, 145 N. Y. Supp. 850.

Sec. 4. Retention of Property Without Foreclosure.

a. *In General.* — If the mortgagor fails to pay the debt at the maturity of the mortgage, the absolute legal title to the mortgaged property vests in the mortgagee. He may sell the property in foreclosure of the mortgage and thus extinguish the mortgagor's equity of redemption. But he may retain the possession of the property and no legal right of the mortgagor is thereby infringed, though the mortgagor may redeem within a reasonable time.⁵³ The mortgagor cannot recover the payments made by him as a conditional vendee is entitled to do under section 65 of the Personal Property Law.^{53a} As the mortgagor has a right of redemption, the mortgagee cannot deal with the property quite as his own.⁵⁴ While the mortgagee keeps the property, he is bound to take care of it. He cannot, without incurring responsibility, negligently suffer it to be stolen or damaged. Any reasonable expense to which he is subjected in the care of the property is a proper charge against it.⁵⁵

b. *Satisfaction of Debt Thereby.* — Where the mortgagee after default retains the mortgaged property without foreclosing the mortgagor's equity of redemption, if the property is equal in value to the amount of the debt, the debt is deemed satisfied.⁵⁶ If the property is worth more than the goods, the mortgagor has no legal remedy to recover the difference; his only remedy is to redeem in equity.⁵⁷ The value of the property at the time it is taken by the mortgagee, not the value at a subsequent time, controls in determining whether the debt is satisfied.⁵⁸

53. *Coe v. Cassidy*, 72 N. Y. 133; *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291; *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546; *Bunacleugh v. Poolman*, 3 Daly 236; *Burdick v. McVanner*, 2 Denio 170; *Hulsen v. Walter*, 34 How. Pr. 385; *Pulver v. Richardson*, 3 T. & C. 436.

53a. *Gaul v. Goldburg Furniture and Carpet Co.*, 85 Misc. 426, 147 N. Y. Supp. 516.

54. *Stoddard v. Dennison*, 38 How. Pr. 296, 7 Abb. Pr. 309.

55. *Coe v. Cassidy*, 72 N. Y. 133.

It is a question for the jury whether it was necessary and proper to employ a watchman for the property and whether the sum paid such

watchman was reasonable. *Coe v. Cassidy*, 72 N. Y. 133.

56. *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291; *Third Nat. Bank v. Shields*, 55 Hun 274, 8 N. Y. Supp. 938; *Grok's Sons v. Feldman*, 40 Misc. 303, 81 N. Y. Supp. 970; *Levy v. Reich*, 78 Misc. 413, 138 N. Y. Supp. 419; *Stoddard v. Dennison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546; *Pulver v. Richardson*, 3 T. & C. 436; *Case v. Boughton*, 11 Wend. 106.

57. *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546.

58. *Pulver v. Richardson*, 3 T. & C. 436.

Where the property is taken by the mortgagee, not for the purpose of foreclosure, but for the purpose of protecting the property and the mortgagor's security, the debt is not necessarily discharged.⁵⁹ If goods sold subject to a chattel mortgage are abandoned by the mortgagor the mortgagee may retake possession, sue for the amount unpaid, hold the goods as security for his claim, and sell them under his execution if it be not otherwise satisfied.^{59a} Thus, where a landlord, holding a chattel mortgage upon his tenant's household furniture, takes possession thereof on its abandonment by the tenant and cares for it, the debt is not deemed satisfied thereby.⁶⁰

Where the mortgagee's right to the goods is disputed by a third person and the mortgagee does not, therefore, sell the property before the determination of the rights of the parties, the debt is not presumed to be paid by the retention of the property.⁶¹

Sec. 5. Action by Mortgagee for Possession.

a. *In General.* — Upon default, or at any other time when entitled to the possession thereof, the mortgagee may maintain an action in replevin to recover the possession of the mortgaged chattels.⁶² It is not the purpose of this work to discuss exhaustively the practice in actions of this character. The procedure in courts of record is outlined in sections 1689-1736 of the Code of Civil Procedure; in justice's courts, sections 2919-2933; in the Municipal Court of New York, sections 57-91 of the Municipal Court Act.⁶³

b. *Parties.* — The necessary parties defendant in an action of replevin by a mortgagee are the persons having possession of the

59. *Beadleston & Woerz v. Morton*, 16 Misc. 72, 37 N. Y. Supp. 666.

59a. *Bloomingdale v. Gaudio*, 85 Misc. 389, 147 N. Y. Supp. 432.

60. *Lathers v. Hunt*, 16 Daly 349, 10 N. Y. Supp. 529.

61. *Third Nat. Bank v. Shields*, 55 Hun 274, 8 N. Y. Supp. 938; *German-American Bank of Tonawanda v. P. W. Scribner Lumber Co.*, 81 Hun 140, 30 N. Y. Supp. 740.

62. *Fidelity Loan Assoc. v. Connolly*, 92 N. Y. Supp. 252; *Fuller v.*

Acker, 1 Hill 473. See also *Eisler v. Union Transfer & Storage Co.*, 16 Daly 456, 12 N. Y. Supp. 732.

Mortgagor Entitled to Possession. — Where the mortgagor is entitled to possession until default, the mortgagee cannot recover in replevin. *Redman v. Hendricks*, 1 Sandf. 32.

63. *Replevin.* — See *Wait's Law and Practice* (7th ed.), vol. 11, p. 312; *Fiero on Special Actions* (3d ed.), p. 1882.

property. Where the property is in the possession of a warehouseman, the mortgagor need not be joined.⁶⁴

c. *Demand.* — A demand for the mortgaged property is not generally necessary before the commencement of an action for its recovery.⁶⁵ Even though the mortgage requires a demand of the mortgagor before the mortgagee can recover the possession thereof from the mortgagor, as against a third person wrongfully obtaining the property from the mortgagor, a demand is not necessary.⁶⁶

d. *Judgment.* — The judgment in an action of replevin awards possession of the property and in some cases, if a delivery of the property cannot be had, awards the plaintiff a fixed sum as the value thereof.⁶⁷ In an action by a mortgagee to recover the property from the mortgagor or a person succeeding to the mortgagor's title, the value is fixed as that of the plaintiff's interest in the chattels, that is, the amount due on the mortgage.⁶⁸

Sec. 6. Action to Recover Debt.

a. *In General.* — Even though the mortgagee has no effectual remedy upon the mortgage, he may bring an action against the debtor to recover the debt secured thereby. The debt is not merged in the mortgage.⁶⁹ Upon the recovery of a judgment for the debt, an execution may generally be levied against the property described in the mortgage, and the mortgagee will thus collect his debt.⁷⁰ But he cannot in all cases recover the debt of the mortgagor, for the debt may be owing by one person while the mortgage be given by another.⁷¹ The parties by their contract may confine the

64. *Hazlett v. Hamilton Storage and Warehouse Co.*, 47 Misc. 660, 94 N. Y. Supp. 580.

65. *Brockman v. Buell*, 16 Daly 90, 9 N. Y. Supp. 895.

66. *Brown v. Cook*, 3 E. D. Smith 123; *Close v. Brennan*, 12 Week. Dig. 347.

67. See Code Civ. Proc., § 1730.

68. *Allen v. Judson*, 71 N. Y. 77.

69. *Lathers v. Hunt*, 16 Daly 135, 9 N. Y. Supp. 494; *Sterling v. Rogers*, 25 Wend. 658.

The holder of a note secured by a chattel mortgage may, without first exhausting his remedy under the mortgage, sue the indorsers upon the note. *Third Nat. Bank v. Shields*, 55 Hun 274, 8 N. Y. Supp. 938.

70. *Emerson v. Knapp*, 129 App. Div. 827, 114 N. Y. Supp. 794; *Lathers v. Hunt*, 16 Daly 135, 9 N. Y. Supp. 494.

71. *Blake v. Corbett*, 120 N. Y. 327.

remedy of the mortgagee to the mortgage.⁷² Where the mortgagor of chattels sells the same to a third person who assumes and agrees to pay the debt as a part of the purchase price, the mortgagee may recover the debt of such vendee.⁷³ But an announcement made upon an auction of property, that it is sold subject to a chattel mortgage and that the purchaser will have to comply with the conditions thereof, does not impose a personal obligation upon a purchaser who hears and assents to the announcement, and an action cannot be maintained against him to recover the amount secured by the mortgage.⁷⁴ The acts of the mortgagee in taking possession of and selling the property operates as a payment of the debt to the extent realized unless there is some special reason why the mortgagee is not required to so apply the proceeds.⁷⁵ The discharge of the debt by the taking and retention of the mortgaged property is discussed in another section of this work.⁷⁶

b. *Action Upon Mortgage to Recover Debt.* — An action cannot be maintained upon the mortgage to recover the debt, unless the instrument contains an agreement to pay the same or a distinct acknowledgment thereof; where the instrument contains no such

72. *Matthews v. Sheehan*, 69 N. Y. 585.

73. *Briggs v. Oliver*, 68 N. Y. 336; *Bernheimer v. Blumenthal*, 42 App. Div. 193, 58 N. Y. Supp. 1003.

The consideration for the promise in such a case is the purchase of the mortgaged property, and, the mortgagor being bound to pay this sum to the mortgagee, an agreement by the vendee to assume and pay that debt is a valid contract which can be enforced by the mortgagee against the vendee, the vendee becoming the principal debtor and responsible to the mortgagee for the amount due. *Bernheimer v. Blumenthal*, 42 App. Div. 193, 58 N. Y. Supp. 1003.

But the mortgagee cannot bring an action against the mortgagor and the

purchasers of the mortgaged property to intercept the purchase price which the mortgagor has sued for, and to compel its application upon the mortgage; such an action stands as an action by a creditor before judgment to reach the equitable assets of his debtor and cannot be maintained where the insolvency of the debtor is not shown. *Briggs v. Oliver*, 68 N. Y. 336.

74. *Hamill v. Gillespie*, 48 N. Y. 556.

75. *German-American Bank of Tonawanda v. P. W. Scribner Lumber Co.*, 81 Hun 140, 30 N. Y. Supp. 740.

76. See *supra*, the section *Satisfaction of Debt Thereby*, p. 144.

recognition of liability, the action must be brought upon the debt.⁷⁷ Thus, where there was no express covenant in the mortgage to pay the debt or any acknowledgment except that the instrument was declared to be executed for the purpose of securing the payment of a certain sum, and there was a proviso that the instrument should cease and be void on payment of the sum, and in case of default the mortgagee could sell the property and apply the proceeds in payment, rendering the surplus to the defendant, it was held that an action of debt would not lie upon the instrument.⁷⁸ But where the mortgage in express words recited that the mortgagor was indebted to the mortgagee in a certain sum, the mortgagee may bring the action on the instrument itself.⁷⁹ Where the mortgage contains a covenant by the mortgagors to pay the amount for which the mortgage was given and the mortgage is under seal, an action may be brought on the mortgage to recover such amount, though the statute of limitations would furnish a bar to an action upon the notes given therewith.⁸⁰

Sec. 7. Action for Conversion of Chattels.

a. *In General.* — When the mortgagee is entitled to the possession of the mortgaged property, any person withholding or taking possession thereof from the mortgagee is guilty of conversion and liable accordingly.⁸¹ But the mortgagee cannot recover without

77. *Culver v. Sisson*, 3 N. Y. 264; *Weed v. Covill*, 14 Barb. 242; *Salisbury v. Philips*, 10 Johns. 57.

Where a chattel mortgage contains no agreement to pay the sum secured thereby, and no recital or declaration of indebtedness from the mortgagor to the mortgagee, no action will lie by the mortgagee, upon the mortgage, to recover the debt secured. *Weed v. Covill*, 14 Barb. 242.

78. *Culver v. Sisson*, 3 N. Y. 264.

79. *Elder v. Rouse*, 15 Wend. 218.

80. *Dinniny v. Gavin*, 4 App. Div. 298, 39 N. Y. Supp. 485, *aff'd*, 159 N. Y. 556, *mem.*

81. *Malcom v. O'Reilly*, 89 N. Y. 156; *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 277; *Bauman v. Jefferson*, 4 Misc. 147, 23 N. Y. Supp. 685; *Biehler v. Irwin*, 84 N. Y. Supp. 574; *Dethoff v. Gattie*, 103 N. Y. 589; *Chadwick v. Lamb*, 29 Barb. 518; *Wray v. Fedderke*, 11 J. & S. 335; *Wellington v. Morey*, 12 Week. Dig. 476, *aff'd*, 90 N. Y. 656, *mem.*

Trover. — See generally Wait's Law and Practice (7th ed.), p. 236.

Where an officer levies on the mortgaged property under process against the mortgagor who is in default, the mortgagee can recover of the officer

an existing right to the immediate actual possession of the property.⁸² The assignee of the mortgagee may likewise recover for the conversion of the property.⁸³ An assignment by the mortgagee of his claim for damages for a conversion of mortgaged chattels is an election and he cannot subsequently maintain an action for the recovery of the goods.⁸⁴

b. *Liability of Purchaser from Mortgagor.* — If a purchaser of the property from the mortgagor retains or disposes of the property without the consent of the mortgagee at a time when the latter is entitled to the possession thereof, he is liable to the mortgagee for conversion.⁸⁵ But if such purchaser transfers the goods before the mortgagee becomes entitled to the possession thereof, the mortgagee has no action of conversion against him; the remedy of the mortgagee is against the person having the property while the mortgagee is entitled thereto.⁸⁶ The fact that the mortgage contains a "danger clause" permitting the mortgagee to take possession of the property whenever he deems himself unsafe does not change the rule.⁸⁷

c. *Liability of Agent of Mortgagor.* — Where a person assists the mortgagor in wrongfully disposing of the mortgaged property, though he acts as an innocent tool, he is liable to the mortgagee

and of the parties to the process where they act in concert with and assist the officer and the purchasers in the removal of the property. *Underhill v. Reinor*, 2 Hilt. 319.

Allegation of Filing. — In an action by a mortgagee of chattels to recover the value of a part of the mortgaged property wrongfully taken from the possession of the mortgagor, it is not necessary to allege in the complaint, that the mortgage was duly filed in the county where the property was situated. *Moses v. Walker*, 2 Hilt. 536.

82. *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 277.

83. *Wolff v. Rausch*, 22 Misc. 108, 48 N. Y. Supp. 716.

84. *Bauman v. Jefferson*, 4 Misc. 147, 23 N. Y. Supp. 685.

The assignee of a claim for the conversion of the chattels can recover though the chattel mortgage itself is not assigned to him. *Bauman v. Jefferson*, 4 Misc. 147, 23 N. Y. Supp. 685.

85. See *Mack v. Phelan*, 92 N. Y. 20; *Sheldon v. McFee*, 216 N. Y. 618.

86. *Hathaway v. Brayman*, 42 N. Y. 322; *Martin v. Lewinski*, 54 App. Div. 573, 66 N. Y. Supp. 995; *Gregg v. Wittemann*, 12 Misc. 90, 32 N. Y. Supp. 1131.

87. *Hathaway v. Brayman*, 42 N. Y. 322, *disapproving Chadwick v. Lamb*, 29 Barb. 518.

for the conversion of the property. Thus, where a jeweler received mortgaged jewelry from the mortgagors, supposing they were the owners thereof, and at their request negotiated a sale thereof to other persons, paying the proceeds to the mortgagors without any charge for his services, it was held that he was liable to the mortgagee for the conversion of the property.⁸⁸ And where auctioneers were employed by the mortgagor to sell the property and it was sold in hostility to the mortgage, it was held that they were liable to the mortgagee.⁸⁹

d. *Liability of Officer.* — A sheriff or constable who levies upon and sells the mortgaged property under process against the mortgagor or some third party is liable to the mortgagee for conversion of the property.⁹⁰ Where, however, the mortgagor has a leivable interest,⁹¹ a sale of the property in general terms without recognition of the mortgagee's rights does not necessarily render the officer or parties promoting the sale trespassers or guilty of conversion.⁹²

88. *Spraight v. Hawley*, 39 N. Y. 441, *aff'd* *Dudley v. Hawley*, 40 Barb. 397.

89. *Moloughney v. Hegeman*, 9 Abb. N. C. 403, holding that in such an action the mortgagee need not show that the mortgagor is irresponsible.

90. *Butler v. Miller*, 1 N. Y. 496; *Hall v. Sampson*, 35 N. Y. 274; *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 277; *Farrell v. Hildreth*, 38 Barb. 178; *Underhill v. Reinor*, 2 Hilt. 319.

The possessory right of a mortgagor is a proper subject of levy and seizure under an attachment or execution; but if the possessory right terminates while the mortgaged property is still in the hands of the officer, as the title of the mortgagee thereby becomes absolute, he has an immediate right, as owner, to claim the delivery of the property, and its further detention is an unlawful conversion; the mortgagee is entitled to an un-

conditional delivery and is under no obligation to pay or tender payments of the costs and expenses of the process. *Fairbanks v. Bloomfield*, 5 Duer 434.

91. See *infra*, the subdivision *Levy Upon Mortgaged Property*, p. 163.

92. *Hull v. Carnley*, 11 N. Y. 501; *Goulet v. Asseler*, 22 N. Y. 225; *Manning v. Monaghan*, 28 N. Y. 585; *Hale v. Omaha National Bank*, 7 J. & S. 207, *aff'd*, 64 N. Y. 550.

Where a mortgagor of chattels is rightfully in possession before a default, and they are seized on execution as his property, and sold and delivered to the purchasers, the mortgagee cannot maintain an action, in the nature of trespass or trover, against the execution-creditor, for the value of the goods; his only remedy is a suit in the nature of a special action on the case, to recover the actual damages for the injury to his lien. *Goulet v. Asseler*, 22 N. Y. 225.

But even, in such a case, if the sale is so conducted that the property is sold in parcels to different purchasers, the mortgagee may recover the damages caused by the unlawful dispersal of his property.⁹³

e. *Necessity of Demand.* — Where the mortgagor has converted the mortgaged property, no demand is necessary for the maintenance of an action of conversion by the mortgagee.⁹⁴ Nor is a demand necessary in an action against a person wrongfully taking the property from the mortgagor.⁹⁵ Thus, where an officer with process against the mortgagor levies upon the property, when the mortgagor has no leviable interest therein, no demand is necessary.⁹⁶

f. *Damages.* — In an action of conversion by a mortgagee against a stranger who shows no right or title to the property, he may recover the full value of the mortgaged property though it exceeds the amount of the debt; the difference is the subject of an accounting between the parties.⁹⁷ But in an action against the mortgagor or a person succeeding to his rights, not more than the amount of the debt is recoverable.⁹⁸ In an action by a second mortgagee against a prior mortgagee claiming under a usurious mortgage to recover for conversion of the property, the plaintiff can

93. *Tifft v. Barton*, 4 Denio 171; *Brown v. Cook*, 3 E. D. Smith 123; *Carpenter v. Simmons*, 1 Rob. 360, 28 How. Pr. 12. See also *Manning v. Monaghan*, 23 N. Y. 539; *same case*, 28 N. Y. 585; *Ostrander v. Weber*, 114 N. Y. 95; *Maloughney v. Hege- man*, 9 Abb. N. C. 403.

If the goods are sold in parcels and delivered to different purchasers, the mortgagee can recover only such damages as have been sustained by a dispersal of the property. *Manning v. Monaghan*, 28 N. Y. 585.

94. *Woodbridge v. Nelson*, 6 Week. Dig. 248.

95. *Keefer v. Greene*, 16 N. Y. Supp. 498; *Moses v. Walker*, 2 Hilt. 536.

“A demand and refusal are not

conversion, but simply evidence of it and are necessary where the property has come lawfully into the defendant's possession; but where it has not so come into his possession, and his acts in relation thereto amount to a conversion, then no demand and refusal need be proved.” *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 277.

96. *Smith v. Smalley*, 19 App. Div. 519, 46 N. Y. Supp. 277. See also *Keefer v. Greene*, 16 N. Y. Supp. 498.

97. *Parish v. Wheeler*, 22 N. Y. 494; *Bigelow v. Goble*, 9 App. Div. 391, 41 N. Y. Supp. 299. See also *Biehler v. Irwin*, 84 N. Y. Supp. 574.

98. *Parish v. Wheeler*, 22 N. Y. 494; *Davis v. Bliss*, 187 N. Y. 77.

recover only the amount remaining due upon his mortgage.⁹⁹ Where a creditor, under a judgment against the mortgagor, who has a leivable interest in the property, levies upon and sells the mortgaged property, the purchaser succeeds to the rights of the mortgagor and the mortgagee can recover only the amount of the mortgaged debt.¹⁰⁰ But there is authority to the effect that, if the levy is made at a time when the mortgagor has no leivable interest in the property, the value of the property is the measure of damages.¹⁰¹ Where the levy is upon chattels not owned by the

Explanation of Rule.—In *Parish v. Wheeler*, 22 N. Y. 494, the court said: “A mortgagee, having the right of possession before forfeiture, and the absolute legal title afterwards, could sue in trover for the conversion of the chattel mortgaged, and, without regard to the amount of his debt, could recover the full value against a stranger guilty of such conversion. But the mortgagor, even after forfeiture, had an equitable right to redeem on payment of the debt. If, therefore, the mortgagee should, in such a case, recover the entire value, in this form of action, the fund, after satisfying the debt, would belong in equity to the mortgagor, and could be recovered by suit in equity, or in the equitable action for money had and received. And from this it necessarily results that in trover by the mortgagee against the mortgagor, the damages should not exceed the amount of the debt; this is a conclusion which avoids a circuituity of remedies. If, in the legal action of trover, the mortgagee recovers a sum, as the value of the property, beyond the amount due to him, on principles of equity, he must refund to the mortgagor, if the equities of the latter have not been in any manner foreclosed or lost; but the law will attain

the same result in a more direct manner, by adjusting the damages, in the first instance, according to the actual rights of the parties.”

99. *Chadwick v. Lamb*, 29 Barb. 518.

100. *King v. Van Vleck*, 40 Hun 68, *aff'd*, 109 N. Y. 363; *Hinman v. Judson*, 13 Barb. 629; *Liver v. Orser*, 5 Duer 501; *Chadwick v. Lamb*, 29 Barb. 518; *Clark v. McDuffie*, 21 N. Y. Supp. 174, 49 St. Rep. 535. See also *Archer v. Cole*, 22 How. Pr. 411.

Where the mortgagee has not taken possession of the mortgaged property and the mortgage was not due at the time of a sale under an execution against the mortgagor, but after the sale he took possession of the property under the danger clause in the mortgage, and the purchaser converted the property, the mortgagee can recover in conversion only the amount of his debt, not the value of the property. *Clark v. McDuffie*, 21 N. Y. Supp. 174, 49 St. Rep. 535.

101. *Biehler v. Irwin*, 84 N. Y. Supp. 574. See also *Chadwick v. Lamb*, 29 Barb. 518.

In an action by a mortgagee for the conversion of goods by an execution-creditor, a judgment for \$175 cannot be sustained where the only evidence as to damages is that the

judgment debtor, the mortgagee thereof can recover the full value.¹⁰²

Sec. 7-a. Action Against Mortgagor for Impairment of Security.

If the mortgagor of property makes a fraudulent disposition thereof, as prohibited by section 940 of the Penal Law, it may be that the mortgagee could maintain an action against him for impairing the security; but, when the mortgagor transfers the property to a third person before default in the payment of the mortgage, the purchaser takes title subject to the mortgage, and hence in such a case the mortgagee cannot maintain an action against the mortgagor for the impairment of the security, when the insolvency of the parties or inability to seize the property is not shown.^{102a}

Sec. 8. Foreclosure by Sale of Chattels.

a. *In General.*—After default the mortgagor still has an equity of redemption in the mortgaged chattels. This right is lost by a foreclosure of the mortgage either by action or by a *bona fide* sale under the power of sale.¹⁰³ The remedy of sale, under the power is generally more speedy and effectual than by action.¹⁰⁴ Under a power of sale the mortgagee may sell the mortgaged chattels either at public or private sale and, if the sale is *bona fide*, the mortgagor's equity will be cut off.¹⁰⁵ But where the mortgage provides in terms for a public sale, a private sale will not cut off the equity of redemption.¹⁰⁶ Unless the mortgage expressly

goods were sold on the execution sale for \$38.35. *Midas v. Lefstein*, 126 N. Y. Supp. 535.

102. *Bigelow v. Goble*, 9 App. Div. 391, 41 N. Y. Supp. 299.

102a. *Norton v. Shields*, 174 App. Div. 804, 161 N. Y. Supp. 880.

103. *Coe v. Cassidy*, 72 N. Y. 133; *Phoenix Nat. Bank v. Cleveland*, 11 N. Y. Supp. 873, 34 St. Rep. 498; *Bunacleugh v. Poolman*, 3 Daly 236; *Charter v. Stevens*, 3 Denio 33; *Stoddard v. Dennison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Patchin v. Pierce*, 12 Wend. 61.

Sale to Third Person with Consent of Mortgagor.—If, after default, the mortgagee sells the property to a third person with the consent of the mortgagor, the sale will be equivalent to a formal foreclosure of the equity of redemption. *Talman v. Smith*, 39 Barb. 390.

104. *Briggs v. Oliver*, 68 N. Y. 336.

105. *Coe v. Cassidy*, 72 N. Y. 133; *Sherman v. Slayback*, 58 Hun 255; *Chamberlain v. Martin*, 43 Barb. 607; *Ballou v. Cunningham*, 60 Barb. 425; *Lathers v. Hunt*, 16 Daly 135, 9 N. Y. Supp. 494.

Private Sale.—When the mortgage contains a clause authorizing the mortgagee to sell at private sale, the mortgagee by so selling does not render himself liable to account to the mortgagor for the full value of the property. The sale is valid and cuts off the equity of redemption. *Ballou v. Cunningham*, 10 Barb. 425.

Where the holder of a chattel mortgage forfeited by non-payment places what purports to be a copy of the mortgage in the hands of another, as evidence of his authority to take the property, and the latter by his agent takes possession of the mortgaged property, and sells it in pursuance of the terms of the mortgage, such sale will not be rendered invalid by an unimportant variance between the copy and the original, where the possession of the property is not fraudulently obtained by the presentation of the instrument as a true copy, nor such possession yielded on that ground. *Dane v. Mallory*, 16 Barb. 46.

106. *Randall v. Dunbar*, 14 Week. Dig. 332.

requires notice of the sale to be given to the mortgagor, the sale may be without such notice.¹⁰⁷

b. *Requirement of Good Faith.* — A sale under the power of sale, to cut off the equity of redemption or to authorize the mortgagee to sue for a deficiency, must be made in good faith.¹⁰⁸ Where property worth \$60,000, consisting of a large number of articles, was sold in bulk for \$1,000, when none of the officers of the corporate mortgagor were present and when the property was not visible to the persons attending the sale, it was held that the sale was not in good faith and did not cut off the equity of redemption.¹⁰⁹ And where the mortgagees of a corporate chattel mortgage for over \$17,000 took possession of the property, which was worth more than the amount of the debt, and the same was sold in bulk to one of the mortgagees for \$1,000 at a sale where the property was not visible, it was held that the sale was not *bona fide*.¹¹⁰

c. *Right of Mortgagee to Purchase.* — If a sale under the power of sale is conducted fairly and in good faith, the mortgagee may purchase the property and hold the same free from the equity of redemption.¹¹¹ But a purchase by the mortgagee at an

107. *Chamberlain v. Martin*, 43 Barb. 607; *Ballou v. Cunningham*, 60 Barb. 425; *Halstead v. Swartz*, 1 T. & C. 559, 46 How. Pr. 289.

Notice of Sale Waived. — Formal notice of a sale under a chattel mortgage may be waived by the mortgagor, as where he attends the sale without objection. *French v. Powers*, 18 Week. Dig. 86.

The only right that remains to the mortgagor after default in payment is that of redemption and this right may be barred by a sale of the property at public auction, or private sale without notice. *Halstead v. Swartz*, 1 T. & C. 559, 46 How. Pr. 289.

108. *Coe v. Cassidy*, 72 N. Y. 133; *Sherman v. Slayback*, 58 Hun 255, 12

N. Y. Supp. 291; *Chamberlain v. Martin*, 43 Barb. 607; *Ballou v. Cunningham*, 60 Barb. 425; *Stoddard v. Dennison*, 38 How. Pr. 296, 7 Abb. Pr., N. S., 309; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd* on other grounds, 52 N. Y. 185.

109. *Cassery v. Witherbee*, 119 N. Y. 522.

110. *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291.

111. *Olcott v. Tioga R. Co.*, 27 N. Y. 546; *French v. Powers*, 120 N. Y. 128; *Edmiston v. Brucker*, 40 Hun 256; *King v. Walbridge*, 48 Hun 470, 1 N. Y. Supp. 11; *Hall v. Ditson*, 5 Abb. N. C. 198; *Hendricks v. Robinson*, 2 Johns. Ch. 283. See also

inadequate price may, in some cases, afford grounds for holding that the mortgagee has not fulfilled the requirement of good faith.¹¹²

d. *Excessive Sale.* — The mortgagee can sell only enough of the property to satisfy his debt. If he continues to sell the property after he has realized enough to satisfy the debt and costs, he becomes a trespasser and is liable in conversion to the mortgagor or the person succeeding to the mortgagor's title.¹¹³ When enough of the property is sold to satisfy the debt, the power of sale becomes, *ipso facto*, void and the mortgagee becomes a trustee of the mortgagor as to the balance of the property.¹¹⁴ The mortgagor may, however, elect to treat the entire sale as valid and to regard the excessive sum received as surplus money in the hands of the mortgagee.¹¹⁵

e. *Surplus.* — Where the mortgagee sells the mortgaged property for more than enough to pay the mortgage debt, the mortgagor or his successor is entitled to the surplus and may maintain

Davenport v. McChesney, 86 N. Y. 242. *Compare Buffalo Steam Engine Works v. Sun Mutual Ins. Co.*, 17 N. Y. 401; *Pulver v. Richardson*, 3 T. & C. 436.

"But it may be seriously questioned whether the situation of a mortgagee in possession, who sells the mortgaged property under the power of sale and becomes himself the purchaser, does not still occupy the position of a mortgagee in possession with his mortgage debt paid by reason of the value of the property exceeding the amount of the mortgage debt." *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291.

The purchase cannot be impeached in a suit to which the mortgagor is not a party. *Olcott v. Tioga R. Co.*, 27 N. Y. 546.

112. See *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291.

The mortgagor cannot object that the mortgagee purchased the property where the purchase was so made at the request of the mortgagor. *French v. Powers*, 18 Week. Dig. 86.

113. *O'Rourke v. Hadcock*, 114 N. Y. 541; *Montgomery v. Lee*, 10 St. Rep. 119; *Charter v. Stevens*, 3 Denio 33.

By selling a portion of the mortgaged property after default under a power of sale, and thereby satisfying the debt, the mortgagor waives all right to the title to the property not required for the purpose of satisfying his claim. *Charter v. Stevens*, 3 Denio 33.

114. *Charter v. Stevens*, 3 Denio 33.

115. *Davenport v. McChesney*, 86 N. Y. 242.

an action for its recovery.¹¹⁸ A creditor of the mortgagor may reach such surplus fund and cause it to be applied on his claim.¹¹⁷ A receiver of the property of the mortgagor, appointed in supplementary proceedings, may maintain an action against the mortgagee to recover such surplus.¹¹⁸

f. *Warranty of Title.*—A warranty of title is not implied where it appears that the seller does not intend to assert title of ownership in himself, but simply to transfer such interest or title as he has.¹¹⁹ A public sale of property by virtue of a chattel mortgage is notice that the mortgagee is not selling his own title to the property, but that which he has acquired through the mortgage, and no warranty of title to the property so sold is implied against the mortgagee.¹²⁰

Sec. 9. Foreclosure by Action.

a. *In General.*—In addition to the other remedies which a mortgagee has for the collection of his debt, he may upon default bring a suit in equity to foreclose the mortgage.¹²¹ In such a

116. *Davenport v. McChesney*, 86 N. Y. 242; *Hardt v. Deutsch*, 30 App. Div. 589, 52 N. Y. Supp. 335; *Farmers' Bank of Washington County v. Cowan*, 2 Abb. Dec. 88, 2 Keyes 217; *Pratt v. Stiles*, 17 How. Pr. 211, 9 Abb. Pr. 150; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, rev'd on other grounds, 52 N. Y. 185.

117. *Hardt v. Deutsch*, 30 App. Div. 589, 52 N. Y. Supp. 335.

Agreement for Payment of Surplus.—In a dispute between a mortgagee who had seized the mortgaged property and an attaching creditor of the mortgagor, a stipulation was made in the attachment action, signed by the mortgagor and mortgagee but reciting no consideration, providing that the property should be sold and the proceeds first applied on the mortgage debt and the balance paid to the

creditor, and it was held that, on a refusal of the mortgagee to pay over such surplus, the stipulation was not void as an agreement to pay the debt of another and that a demand upon the mortgagee by the mortgagor for such surplus did not excuse its payment to the creditor. *Scherzer v. Muirhead*, 84 N. Y. Supp. 159.

118. *Davenport v. McChesney*, 86 N. Y. 242.

119. *Cohn v. Ammidown*, 120 N. Y. 398.

120. *Cohn v. Ammidown*, 120 N. Y. 398; *Sheppard v. Earles*, 13 Hun 651.

121. *Briggs v. Oliver*, 68 N. Y. 336; *Ostrander v. Weber*, 114 N. Y. 95; *Lembeck, etc., Brewing Co. v. Sexton*, 184 N. Y. 185; *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136; *Budweiser Brewing Co. v. Capparelli*, 16 Misc. 502, 38 N. Y. Supp. 972;

suit, the form of pleading, mode of procedure and jurisdiction of the court are in most respects the same as in a suit to foreclose a mortgage upon real estate.¹²² Where the defendant interposes a defense that the mortgage was fraudulently procured, the action is not compulsorily referable, as difficult questions of law are involved.¹²³ It is improper to unite in one action the foreclosure of several chattel mortgages given to secure different obligations, not covering the same chattels, some of which are claimed by one defendant and some by others.^{123a}

b. *Parties.* — The mortgagor is a necessary party to a suit to foreclose the mortgage though he is not in possession of the mortgaged property.¹²⁴ Where a debtor has assigned property to a third person and the two together have executed a chattel mortgage upon the property to the creditor to secure the debt, both mortgagors are properly joined as defendants.¹²⁵ An allegation that a defendant has or claims to have some interest in the mortgaged property is sufficient to show that such defendant is a proper party to the suit, and in case of his failure to protect his interest in the subject matter thereof, the complaint is sufficient to justify the plaintiff in entering a judgment of foreclosure and sale cutting off all rights which such defendant has therein, which are subordinate to the plaintiff's mortgage.¹²⁶

Hanson v. Kaessmayer, 91 N. Y. Supp. 755; *Consumers' Brewing Co. v. Braun*, 132 N. Y. Supp. 87; *Lathers v. Hunt*, 16 Daly 135, 9 N. Y. Supp. 494; *Charter v. Stevens*, 3 Denio 33; *Robinson v. Wilcox*, 2 Leg. Obs. 160. See generally *Fiero on Special Actions* (3d ed.), p. 28.

A provision in a chattel mortgage that the mortgagee may take possession of the property and sell the same upon default by the mortgagor in any of the installments of payment does not take from the mortgagee his right to foreclose the mortgage. *Harris Automatic Press Co. v. Demarest Pattern Co.*, 47 Misc. 624, 94 N. Y. Supp. 462.

122. *Lembeck, etc., Brewing Co. v. Sexton*, 184 N. Y. 185.

123. *Goodyear v. Brooks*, 4 Rob. 682, 2 Abb. Pr., N. S., 296.

123a. *Griffin v. Armsted*, 162 App. Div. 936, 147 N. Y. Supp. 1114.

124. *Fishel v. Hamilton Storage Warehouse Co.*, 42 Misc. 532, 86 N. Y. Supp. 196.

Deposited With Storage Company. — If the chattels have been removed by the mortgagor to a storage company without the consent of the mortgagee, after the default of the former and a demand on the part of the latter, in a suit to foreclose the lien of the mortgage, the mortgagor should be made a party defendant, since he has a right of redemption, which may have a substantial value, although he has lost all title and right of possession by his default. *Bauman v. Kuhn*, 57 Misc. 618, 108 N. Y. Supp. 773.

125. *Blake v. Crowley*, 12 St. Rep. 650, 28 Week. Dig. 139.

126. *Albany City Nat. Bank v. Hudson River Brick Mfg. Co.*, 79 Hun 387, 29 N. Y. Supp. 793.

c. *Defenses.* — One of the limitations upon the equitable jurisdiction to foreclose a mortgage is that there can be no litigation of title paramount or hostile to the mortgage.¹²⁷ But this general rule does not preclude the court from deciding whether an asserted title is in fact paramount or hostile in a case where that is one of the issues presented by the pleadings.¹²⁸

The mortgagor may impeach the mortgage on the ground that it was secured by fraudulent misrepresentation, but the burden is upon him to establish such defense.¹²⁹

Where the wife of the mortgagor in a purchase-money mortgage, after desertion by her husband, is made a defendant in a suit for the foreclosure thereof without prayer for personal judgment against her, she cannot defend except upon the ground that she is not in possession; when her possession and the default are admitted, the mortgagee is entitled to a judgment of foreclosure irrespective of whether the defendant or her husband executed the mortgage.¹³⁰

d. *Counterclaim.* — In a suit by a mortgagee of chattels to foreclose the mortgage and to obtain a personal judgment for the debt, subsequent purchasers of the mortgaged property cannot avail themselves of a demand in favor of the mortgagor, against the mortgagee, as a counterclaim.¹³¹ Where, in a suit by a second mortgagee for the foreclosure of his mortgage, a defendant who is the owner of a prior mortgage interposes an answer containing allegations appropriate solely to an original complaint to foreclose a mortgage and demands judgment for the foreclosure thereof, the allegations, though pleaded as an answer and defense, constitute a counterclaim which is admitted by the plaintiff's failure to reply thereto.¹³²

127. Lembeck, etc., *Brewing Co. v. Sexton*, 184 N. Y. 185.

130. *Wuertz v. Braun*, 122 App. Div. 433, 107 N. Y. Supp. 429.

128. Lembeck, etc., *Brewing Co. v. Sexton*, 184 N. Y. 185.

131. *Beers v. Waterbury*, 8 Bosw. 396.

129. *Tannenbaum v. Schaffer*, 122 N. Y. Supp. 180; *Ross v. Titterton*, 6 Hun 280.

132. *McCrea v. Hopper*, 35 App. Div. 572, 55 N. Y. Supp. 136.

Sec. 10. Statutory Provisions for Foreclosure by Action.

a. *In General.* — Statutory provisions regulating the foreclosure by action of liens upon chattels are found in sections 206 to 210 of the Lien Law. A chattel mortgage is, strictly speaking, not a lien upon a chattel and good grounds might be advanced for holding that such sections are not applicable to chattel mortgages. However, the Court of Appeals has apparently entertained the view that they are so applicable.¹³³

b. *Jurisdiction of Courts.* — “An action may be maintained to foreclose a lien upon a chattel, for a sum of money, in any case where such a lien exists at the commencement of the action. The action may be brought in any court, of record or not of record, which would have jurisdiction to render a judgment, in an action founded upon a contract, for a sum equal to the amount of the lien.”¹³⁴

c. *Warrant to Seize Chattel.* — “Where the action is brought in the Supreme Court, the city court of the city of New York, or a county court, if the plaintiff is not in possession of the chattel, a warrant may be granted by the court, or a judge thereof, commanding the sheriff to seize the chattel and safely keep it to abide the final judgment in the action. The provisions of title third of chapter seven of the Code of Civil Procedure apply to such warrant, and to the proceedings to procure it, and after it has been issued, as if it was a warrant of attachment, except as otherwise expressly prescribed in this article.”¹³⁵

d. *Judgment.* — “In an action brought in a court specified in the last section, final judgment, in favor of the plaintiff, must specify the amount of the lien, and direct a sale of the chattel to satisfy the same and the costs, if any, by a referee appointed thereby, or an officer designated therein, in like manner as where a sheriff sells personal property by virtue of an execution; and the application by him of the proceeds of the sale, less his fees and expenses, to the payment of the amount of the lien, and the

133. See Lembeck, etc., Brewing Co. *v.* Sexton, 184 N. Y. 185, 190.

134. Lien Law, § 206.

135. Lien Law, § 207.

Reference to Code of Civil Procedure. — The mortgagee is entitled to the warrant without setting forth in his

moving papers the matters required by section 636 of the Code of Civil Procedure. *Coiro v. Baron*, 158 App. Div. 591, 143 N. Y. Supp. 853, overruling *Faraci v. Waller*, 154 App. Div. 303, 138 N. Y. Supp. 961.

costs of the action. It must also provide for the payment of the surplus to the owner of the chattel, and for the safe keeping of the surplus, if necessary, until it is claimed by him. If a defendant, upon whom the summons is personally served, is liable for the amount of the lien, or for any part thereof, it may also award payment accordingly.”¹³⁶

e. *Action in Inferior Court.* — “Where the action is brought in a court, other than one of those specified in section two hundred and seven, if the plaintiff is not in possession of the chattel, a warrant, commanding the proper officer to seize the chattel, and safely keep it to abide the judgment, may be issued, in like manner as a warrant of attachment may be issued in an action founded upon a contract, brought in the same court; and the provisions of law, applicable to a warrant of attachment, issued out of that court, apply to a warrant, issued as prescribed in this section, and to the proceedings to procure it, and after it has been issued; except as otherwise specified in the judgment. A judgment in favor of the plaintiff, in such an action, must correspond to a judgment, rendered as prescribed in the last section, except that it must direct the sale of the chattel by an officer to whom an execution, issued out of the court, may be directed; and the payment of the surplus, if its safekeeping is necessary, to the county treasurer, for the benefit of the owner.”¹³⁷

f. *Application of Foregoing Sections.* — “Sections 206 to 209, inclusive, do not affect any existing right or remedy to foreclose or satisfy a lien upon a chattel, without action; and they do not apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law.”¹³⁸

Sec. 11. Action for Deficiency.

After a fair and *bona fide* sale under the power of sale contained in a mortgage or after the termination of a suit to foreclose the mortgage, if the mortgage debt is not satisfied, the mortgagee may

136. Lien Law, § 208.

137. Lien Law, § 209.

138. Lien Law, § 210.

sue for the balance.¹³⁹ The liability of the mortgagor for a deficiency arising on a chattel mortgage sale arises out of the foreclosure as a matter of law; he is liable though there is no provision in the mortgage providing that he shall be liable therefor.¹⁴⁰ If the mortgagee retains the property without making a sale thereof or foreclosure of the mortgage, he waives his claim for deficiency.¹⁴¹ He cannot recover the deficiency where he takes the property before the maturity of the debt under the danger clause where he did *not* in good faith deem himself insecure.¹⁴² But a valid taking under the danger clause and a sale of the chattels renders the mortgagor liable to the mortgagee for the deficiency, though the time of payment specified in the mortgage has not passed.¹⁴³

Sec. 12. Action in Equity to Determine Priority.

A mortgagee may bring a suit in equity to determine the question of priority between several chattel mortgages covering the same property.¹⁴⁴ The defense that the mortgagee may not resort to equity because he has certain actions at law is not tenable; equity assumes jurisdiction on the ground that conflicting claims and questions of priority can best be adjusted in equity.¹⁴⁵

139. *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291; *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546; *Pulver v. Richardson*, 3 T. & C. 436; *Case v. Boughton*, 11 Wend. 106.

A mortgage, on condition that if the mortgagor pays to the mortgagee the amount of a note of even date the mortgage shall be void, acknowledges a debt of the specified sum, and the mortgagee, selling the chattels pursuant to the mortgage, may sue for deficiency. *Consumers' Brewing Co. of Brooklyn v. Braun*, 132 N. Y. Supp. 87.

140. *Willcox v. Perez*, 115 App. Div. 693, 101 N. Y. Supp. 391; *Cottone v. Spivach*, 159 N. Y. Supp. 241.

141. *Sherman v. Slayback*, 58 Hun 255, 12 N. Y. Supp. 291.

142. *Hyer v. Sutton*, 59 Hun 40, 12 N. Y. Supp. 378; *Oppenheimer v. Moore*, 107 App. Div. 301, 95 N. Y. Supp. 138.

143. *Huggans v. Fryer*, 1 Lans. 276.

144. *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892. See also *Ostrander v. Weber*, 114 N. Y. 95.

Sec. 13. Jurisdiction of Municipal Court of New York in Actions to Enforce Mortgage.

Section 73 of the Municipal Court Act provides in substance that no action of conversion or replevin arising on a chattel mortgage or contract of conditional sale shall be maintained against a conditional vendee or mortgagor. But, according to the provisions of section 77, section 73 does not affect any right or remedy to foreclose or satisfy a lien upon a chattel without action, and does not apply to a case where another mode of enforcing a lien upon a chattel is specially prescribed by law. This statutory provision is not applicable to a mortgage given to secure a loan.¹⁴⁶ It does not preclude the mortgagee from taking possession of the mortgaged property under a clause in the mortgage giving him such right,¹⁴⁷ or from maintaining an action of replevin to recover such possession.¹⁴⁸ An action for a deficiency arising on a sale under a chattel mortgage is not an action on the mortgage and is not barred by this section.¹⁴⁹

145. *Salmon v. Norris*, 82 App. Div. 362, 81 N. Y. Supp. 892.

146. *Fidelity Loan Assoc. v. Connolly*, 92 N. Y. Supp. 252.

147. *Shelton v. Holzwasser*, 46 Misc. 76, 91 N. Y. Supp. 328.

148. *Fidelity Loan Assoc. v. Connolly*, 95 N. Y. Supp. 576.

Injunction against Foreclosure of Mortgage in Municipal Court.—The

Supreme Court may enjoin the threatened foreclosure of a usurious mortgage in the Municipal Court, for the remedy of the mortgagor in such court is not adequate to protect his rights. *Kaufman v. Schwartz*, 174 App. Div. 239, 160 N. Y. Supp. 1056. See, generally, *Joyce on Injunctions*.

149. *Wilcox v. Perez*, 115 App. Div. 693, 101 N. Y. Supp. 391.

CHAPTER X.

RIGHTS AND LIABILITIES OF THIRD PARTIES.

Sec. 1. Creditors.

- a. In General.
- b. Levy upon Mortgaged Property.
- c. Other Remedies of Creditors.

2. Surety.

3. Lienors.

- a. In General.
- b. Hotel, Inn, Boarding-house Keeper, etc.
- c. Bailee of Animals.
- d. Bailee of Motor Vehicles.
- e. Warehouseman.

4. Subsequent Mortgagee.

Sec. 1. Creditors.

a. *In General.* — The rights of creditors of the mortgagor to attack a mortgage for failure to file,¹ or refile² the same, or upon the ground that it was intended to delay, hinder or defraud creditors,³ have been discussed in other chapters of this work.

b. *Levy upon Mortgaged Property.* — A mortgagee of personal property is deemed to have the legal title thereto and such property may properly be levied upon under an execution against him.⁴ And this is true though the property remains in the possession of the mortgagor.⁵

The mere equity of redemption is not the subject of levy and sale, and, where such is the only interest of the mortgagor, the

1. See *supra*, the chapter *Filing*, p. 58.

2. See *supra*, the chapter *Refiling*, p. 91.

3. See *supra*, the chapter *Fraudulent Mortgage*, p. 106.

4. *Saratoga Holding Co. v. Wash-*

burn, 70 Misc. 110, 127 N. Y. Supp. 1016; *Haskins v. Kelly*, 1 Abb. Pr., N. S., 63, 1 Rob. 160.

Leviable Interests upon Chattel Mortgages. — See note to *N. Y. Reports*, Bender Ed., Book 5, p. 216.

5. *Ferguson v. Lee*, 9 Wend. 258.

property cannot be levied upon under an execution against him.⁶ Thus, where the mortgagor is in default, as his only interest in the property is an equity of redemption, it cannot be levied upon under process against him.⁷ And this is so though the mortgagor continues to retain possession of the property after the default.⁸ And where the mortgagee has possession of the property, the mortgagor has no leivable interest in the property, though the mortgage debt is not yet due.⁹ Thus, where a mortgage provided that the mortgagor should permit the mortgagee to "have, possess, occupy, and enjoy," the mortgaged property, whenever he should demand the same and after the mortgagor had absconded, the mortgagee took possession of the property by virtue of the mortgage it was held that the interest of the mortgagor was not the subject of levy upon execution, although the debt secured by the mortgage had not, at the time of the levy, become due.¹⁰

6. *Galen v. Brown*, 22 N. Y. 37; *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*; *National Cash Reg. Co. v. Coleman*, 85 Hun 125, 32 N. Y. Supp. 593; *Craft v. Brandow*, 61 App. Div. 247, 70 N. Y. Supp. 364; *Fishel v. Hamilton Storage Warehouse Co.*, 42 Misc. 532, 86 N. Y. Supp. 196; *Marsh v. Lawrence*, 4 Cow. 461; *Hendricks v. Robinson*, 2 Johns. Ch. 283; *Nichols v. Mead*, 2 Lans. 222, *aff'd*, 47 N. Y. 653, *mem.*

7. *Galen v. Brown*, 22 N. Y. 37; *Porter v. Parmley*, 52 N. Y. 185; *Manchester v. Tibbetts*, 121 N. Y. 219; *Leadbetter v. Leadbetter*, 125 N. Y. 290; *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*; *Craft v. Brandow*, 61 App. Div. 247, 70 N. Y. Supp. 364; *Fishel v. Hamilton Storage Warehouse Co.*, 42 Misc. 532, 86 N. Y. Supp. 196; *Keefer v. Greene*, 16 N. Y. Supp. 498; *Farmers' Bank of Washington County v. Cowan*, 2 Abb. Dec. 88, 2 Keyes 217; *Champlin*

v. Johnson, 39 Barb. 606; *Bryan v. Smith*, 13 Daly 331; *Kleinberger v. Brown*, 26 J. & S. 4, 8 N. Y. Supp. 866.

8. *Champlin v. Johnson*, 39 Barb. 606; *Bryan v. Smith*, 13 Daly 331; *Kleinberger v. Brown*, 26 J. & S. 4.

9. *National Cash Reg. Co. v. Coleman*, 85 Hun 125, 32 N. Y. Supp. 593; *Powers v. Elias*, 21 J. & S. 480.

After a mortgagee has taken possession of the mortgaged property, by virtue of a power in the mortgage, the mortgagor has no remaining interest in it which can be seized and sold on execution, even though the mortgage debt is not due. The interest of the mortgagors is then but an equity of redemption, which is not the subject of seizure and sale on execution. *Nichols v. Mead*, 2 Lans. 222, *aff'd*, 47 N. Y. 653, *mem.*

10. *Mattison v. Baucus*, 1 N. Y. 295. See also *Hathaway v. Brayman*, 42 N. Y. 322; *Crutts v. Daly*, 84 Misc. 192, 145 N. Y. Supp. 850.

But before default, if the mortgagor is entitled to possession of the property for a definite period, he has an interest therein which can be reached by execution, and the property can be sold subject to the mortgage.¹¹ Thus, where a firm executed a bill of sale of its stock in trade as security for a debt, upon the understanding that it should have until the following Tuesday to pay the debt, and that in the meantime the ownership of the property should remain in the firm and it should continue business as before, it was held that the firm had a leviable interest in the property until the following Tuesday.¹² And where a mortgage was due upon demand and contained a clause that until default in payment the mortgagor could continue in possession, it was held that a creditor, before a demand was made, could levy upon the property.¹³ But where a mortgage contained no time of payment, it was held that it was payable immediately without any demand, and that the mortgagor had no interest in the property subject to levy and sale.¹⁴ Where the owner of chattels executed bills of sale, absolute on their face, but made only to secure debts, upon payment of which the chattels were to be returned to the owner, and the latter remained in possession and was entitled to the same for a reasonable time and at the time a levy was made, it was held that the owner had an interest in the chattels which could be taken on execution.¹⁵ Where a mortgage provided that if the mortgagor should permit judgment to be entered against him, the whole sum of the mortgage would become due and the mortgagee would have

11. *Mattison v. Baucus*, 1 N. Y. 295; *Hull v. Carnley*, 11 N. Y. 501; *Goulet v. Asseler*, 22 N. Y. 225; *Manning v. Monaghan*, 28 N. Y. 585; *Hamill v. Gillespie*, 48 N. Y. 556; *Gregg v. Wittemann*, 12 Misc. 90, 32 N. Y. Supp. 1131; *Crutts v. Daly*, 84 Misc. 192, 145 N. Y. Supp. 850; *Clark v. McDuffie*, 21 N. Y. Supp. 174, 49 St. Rep. 535; *Bank of Lansingburgh v. Crary*, 1 Barb. 542; *Champlin v. Johnson*, 39 Barb. 606; *Bryan v. Smith*, 13 Daly 331; *Fairbanks v. Bloomfield*, 5 Duer 434; *Hale v. Omaha National*

Bank

7 J. & S. 207, *aff'd*, 64 N. Y. 550; *Redman v. Hendricks*, 1 Sandf. 32; *Fowler v. Haynes*, 14 Week. Dig. 376, *mod.*, 91 N. Y. 346; *Bailey v. Burton*, 8 Wend. 339.

12. *Hakes v. Thornton*, 59 App. Div. 464, 69 N. Y. Supp. 234.

13. *Livor v. Orser*, 5 Duer 501. See also *Lyman v. Bowe*, 66 How. Pr. 481.

14. *Howland v. Willett*, 3 Sandf. 607.

15. *Fowler v. Haynes*, 14 Week. Dig. 376, *mod.*, 91 N. Y. 346.

the right to take the property and sell it on five days' notice, it was held that the judgment creditor of the mortgagor could acquire no lien on the property by execution, though levied within three days after the entry of judgment, as the five days' notice was not necessary to perfect the default, but simply applied to the time and place of sale.¹⁶ A "danger clause" in a mortgage does not render the possession of the mortgagor so indefinite that the mortgagor has not a leviable interest in the chattels; such a clause gives the mortgagor a right to possession and a leviable interest in the mortgaged property.¹⁷

Where a chattel mortgage gives the mortgagee the right to take possession only on the mortgagor's default in the payment of the sum secured thereby and contains no clause making the whole sum due and payable upon default in the payment of any installment, the mortgaged property while in possession of the mortgagor, though he is in default in the payment of the first installment, may be sold under an execution against him subject to the rights of the mortgagee.¹⁸

Where the mortgage contains a provision to the effect that if the property is levied upon, the mortgage shall become due and the mortgagee may take possession, an officer levying upon the property cannot withhold possession thereof from the mortgagee.¹⁹

Where the mortgagor had a leviable interest at the time of a levy upon the property, the officer is not liable for conversion where he does not sell or withhold the property after the leviable interest terminates.²⁰ But, if the officer detains it after the termination of the leviable interest, he becomes liable to the mortgagee.²¹

In a recent case, the court apparently held that, where a chattel mortgage provides for the rendition of any surplus arising upon the sale to the mortgagor, the mortgagor after default has a leviable

16. *Leadbetter v. Leadbetter*, 125 N. Y. 290.

17. *Hall v. Sampson*, 35 N. Y. 274. *Contra*, *Farrell v. Hildreth*, 38 Barb. 178.

18. *Corrigan v. Sammis*, 65 Misc. 473, 120 N. Y. Supp. 69.

19. *Galen v. Brown*, 22 N. Y. 37; *Bryan v. Smith*, 13 Daly 331.

20. *Randall v. Cook*, 17 Wend. 53.

21. *Fairbanks v. Bloomfield*, 5 Duer 434.

interest subject to the claim of the mortgagee.²² Such a holding does not seem consistent with the principles stated above.

A mortgage given to defraud the creditors of the mortgagor is no obstacle to a levy and sale of the property by a creditor of the mortgagor.²³

If the goods are exempt from execution, a creditor of the mortgagor has no claim thereon, and is liable if he causes a sale thereof under his execution.²⁴

c. *Other Remedies of Creditors.* — A creditor who has levied upon personal property of his debtor under a valid judgment may bring a suit in equity in aid of his execution to procure an adjudication that chattel mortgages executed by the debtor covering such property are fraudulent and void as against his judgment.²⁵ In such a case, it is not necessary to have the execution returned unsatisfied as a condition precedent to the right of a court of equity to take jurisdiction.²⁶

A creditor may come into a court of equity to reach an interest of his debtor not subject to execution, such as the equity of redemption of a debtor who has mortgaged his personal property.²⁷ The creditor in an equitable action may reach the surplus in the mortgagee's hands arising out of a sale of the mortgaged property.²⁸

A fund arising out of a sale of mortgaged chattels will sometimes be awarded to a creditor of the mortgagor. Thus, where a

22. *Moss v. Lightfine*, 60 Misc. 62, 111 N. Y. Supp. 675.

23. *Guilford v. Mills*, 18 N. Y. Supp. 275, *aff'd*, 137 N. Y. 554, *mem.* See also *supra*, the chapter *Fraudulent Mortgages*, p. 106.

24. *Livor v. Orser*, 5 Duer 501. See also *Emerson v. Knapp*, 129 App. Div. 827, 114 N. Y. Supp. 794; *Wilder v. Stewart*, 21 Week. Dig. 93.

25. *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*; *Robinson v. Hawley*, 45 App. Div. 287, 61 N. Y. Supp. 138.

26. *Steffin v. Steffin*, 4 Civ. Pro. Rep. 179.

27. *Craft v. Brandow*, 61 App. Div. 247, 70 N. Y. Supp. 364; *McDermott v. Strong*, 4 Johns. Ch. 687.

A court of equity lends its aid to a judgment creditor by compelling a discovery and account, against a debtor or third person, who has possession of the debtor's property, and placed beyond the reach of the legal process; but the creditor, before he is entitled to such aid, must have sued out execution at law. *Hendricks v. Robinson*, 2 Johns. Ch. 283.

28. *Hardt v. Deutsch*, 30 App. Div. 589, 52 N. Y. Supp. 335.

mortgagee commenced suit for the foreclosure of his mortgage and secured the appointment of a receiver for the property who sold the same, it was held, the mortgage being void as against the creditor, that the court would award the fund to him.²⁹

A creditor may come into equity to redeem an incumbrance or mortgage upon personal property of his debtor. But, before he is entitled to relief, he must have an execution against the mortgagor's property returned unsatisfied.³⁰ The creditor is entitled to redeem from the mortgage only by paying the same and complying with other equitable conditions.³¹

Where a corporation executes to its stockholders mortgages on its real and personal property to defraud its creditors and such stockholders take the property in their possession, the creditors of the corporation may proceed under sections 90 and 91 of the General Corporation Law to set aside such alienation of the corporate property.³²

Sec. 2. Surety.

Where a chattel mortgage is given to secure the mortgagee for his liability as a surety for the mortgagor, the mortgage inures to the benefit of a cosurety of the mortgagee.³³ Where it appears by its terms to have been given to a second indorser of two notes to secure their payment, it may be shown by parol that it was intended as a security for all the indorsers upon the notes, and upon such proof being made it can be enforced by the first indorser.³⁴

Where a surety pays the debt of his principal, he is entitled to be subrogated to all the rights of the creditor and where the creditor holds a chattel mortgage on property of the debtor, the surety

29. *Stewart v. Beale*, 7 Hun 405, *aff'd*, 68 N. Y. 629, *mem.*

30. *McDermott v. Strong*, 4 Johns. Ch. 687.

31. *Cartier v. Pabst Brewing Co.*, 112 App. Div. 419, 98 N. Y. Supp. 516.

32. *Phenix Nat. Bank v. Cleveland Co.*, 11 N. Y. Supp. 873, 34 St. Rep.

498.

33. *Sherman v. Foster*, 158 N. Y. 587.

34. *Bainbridge v. Richmond*, 17 Hun 391, *aff'd*, 78 N. Y. 618, *mem.*

may enforce the mortgage for his own benefit.³⁵ Thus, where it appeared that the plaintiff had given to a partnership a mortgage upon certain real property for the partners to assign as collateral security to a third person for an indebtedness of the partners, and the partners had previously given a chattel mortgage upon certain personal property to secure the same debt, and the plaintiff had been compelled to pay the debt to avoid a foreclosure of the real estate mortgage, it was held the plaintiff was entitled to be subrogated to the rights of the creditor in reference to the chattel mortgage and could enforce the same as against a person to whom the partnership had sold the property.³⁶

Sec. 3. Lienors.

a. *In General.* — The lien of an artisan or mechanic for work done upon a chattel encumbered by a mortgage is generally superior to the mortgage.³⁷ Thus, where a mortgage on a buggy provided that the mortgagor was to have the use and possession of the property and a person made repairs thereon at the request of the mortgagor, it was held that the lien for such repairs was superior to the mortgage as it was to be assumed that the mortgagee impliedly assented to such repairs, but that a claim of the lienor for storage of the buggy was not superior to the mortgage as no implication arose that the mortgagor consented to such a charge.³⁸ And where, after default in the payment of a mortgage upon a canal boat, the owner continued in possession with the knowledge and consent of the mortgagee, running the boat as his own, it was held that the mortgagor was authorized to keep her in repair, and a lien for repairs which were necessary to make her fit for navigation was superior to the mortgage.³⁹

b. *Hotel, Inn, Boarding-house Keeper, etc.* — It is provided by statute that "A keeper of a hotel, apartment hotel, inn, board-

35. *Lewis v. Palmer*, 28 N. Y. 271; *Third Nat. Bank v. Shields*, 55 Hun

274, 8 N. Y. Supp. 938.

36. *Lewis v. Palmer*, 28 N. Y. 271.

37. *Scott v. Delahunt*, 65 N. Y. 128; *Loss v. Fry*, 1 City Ct. Rep. 7.

38. *Tucker v. Werner*, 2 Misc. 193, 21 N. Y. Supp. 264.

39. *Scott v. Delahunt*, 65 N. Y. 128. See also *infra*, the chapter

Mortgages of Vessels, p. 189.

ing house or lodging house, except an emigrant lodging house, has a lien upon, while in possession, and may detain the baggage and other property brought upon his premises by a guest, boarder or lodger, for the proper charges due from him, on account of his accommodation, board and lodging, and such extras as are furnished at his request. If the keeper of such hotel, apartment hotel, inn, boarding or lodging house knew that the property brought upon his premises was not, when brought, legally in possession of such guest, boarder or lodger, or had notice that such property was not then the property of such guest, boarder or lodger, a lien thereon does not exist. An apartment hotel within the meaning of this section includes a hotel wherein apartments are rented for fixed periods of time, either furnished or unfurnished, to the occupants of which the keeper of such hotel supplies food, if required. A guest of an apartment hotel, within the meaning of this section, includes each and every person who is a member of the family of the tenant of an apartment therein, and for whose support such tenant is legally liable.”⁴⁰

The lien mentioned by this section is superior to a chattel mortgage upon the property brought upon the premises unless the lienor had *actual* notice that the guest was not the owner legally in possession thereof.⁴¹ The constructive notice created by the proper filing of the chattel mortgage does not give the mortgage priority.⁴² The lienor is entitled to the property as against the mortgagee though the mortgage was due before the mortgagor brought the property upon the lienor’s premises.⁴³

c. *Bailee of Animals.* — Section 183 of the Lien Law provides: “A person keeping a livery stable, or boarding stable for animals, or pasturing or boarding one or more animals, or who in connection therewith keeps or stores any wagon, truck, cart, carriage, vehicle or harness, has a lien dependent upon the possession upon each

40. Lien Law, § 181.

41. *Matthews v. Victor Hotel Co.*, 132 N. Y. Supp. 375.

42. *Matthews v. Victor Hotel Co.*, 132 N. Y. Supp. 375.

43. *Matthews v. Victor Hotel Co.*,

132 N. Y. Supp. 375; *Corbett v. Cushing*, 4 N. Y. Supp. 616, 15 Daly

170.

animal kept, pastured or boarded by him, and upon any wagon, truck, cart, carriage, vehicle or harness of any kind or description, stored or kept provided an express or implied agreement is made with the owners thereof, whether such owner be a mortgagor remaining in possession or otherwise, for the sum due him for the care, keeping, boarding or pasturing of the animal, or for the keeping or storing of any wagon, truck, cart, carriage, vehicle and harness, under the agreement, and may detain the animal or wagon, truck, cart, carriage, vehicle and harness accordingly, until such sum is paid."

The lien of a bailee within this section is superior to an earlier chattel mortgage upon the same property.⁴⁴ But under a former statute it was essential to the lien that a notice thereof be served,⁴⁵ and before any statute upon the subject it was held that a chattel mortgage was superior to the lien.⁴⁶ Under the present statute, a livery-stable keeper is not entitled to a lien on a truck beyond his reasonable charges for the storage thereof, as against a chattel mortgage prior in time, and cannot hold the truck for an unpaid balance due for boarding horses under an arrangement made before the truck was bought.⁴⁷

d. *Bailee of Motor Vehicles.* — A lien upon motor vehicles in favor of a garage keeper is created by statute as follows: "A person keeping a garage or a place for the storage, maintenance, keeping or repair of motor vehicles, as defined by article eleven of the highway law, and who in connection therewith stores, maintains, keeps or repairs any motor vehicle or furnishes gasoline or other supplies therefor at the request or with the consent of the owner, whether such owner be a conditional vendee or a mortgagor remaining in possession or otherwise, has a lien upon such motor vehicle for the sum due for such storing, maintaining, keeping or repairing of such motor vehicle or for furnishing gasoline or

44. *Corning v. Ackley*, 4 N. Y. Supp. 255, 21 St. Rep. 703; *Peter Barrett Mfg. Co. v. Van Ronk*, 149 App. Div. 194, 134 N. Y. Supp. 691.

45. *Jackson v. Kasseall*, 30 Hun 231.

46. *Bissell v. Pearce*, 28 N. Y. 252.

47. *Peter Barrett Mfg. Co. v. Van Rond*, 149 App. Div. 194, 134 N. Y. Supp. 691, *aff'd*, 212 N. Y. 90.

other supplies therefor and may detain such motor vehicle at any time it may lawfully be in his possession until such sum is paid.”⁴⁸

A garage keeper loses his lien under this statute as against a mortgagee if he voluntarily delivers the property to the mortgagor, though he has an agreement with the mortgagor that he shall not lose his lien by such delivery.⁴⁹

e. *Warehouseman.* — Before the question was complicated by the enactment of statutes, it was held that if valid as against creditors, a chattel mortgage was superior to the lien of a warehouseman with whom the goods were stored by the mortgagor without the consent of the mortgagee.⁵⁰ But if the mortgage was not properly filed, it was not superior, as the warehouseman could attack the mortgage as a creditor of the mortgagor and retain the goods, though he did not procure a judgment upon his claim.⁵¹

In 1902 a statute was passed (chapter 608) which changed the prior rule and rendered the lien superior to a mortgage upon the property.⁵² This statute was, however, repealed by the act (chap.

48. Lien Law, § 184.

49. *Thourot v. Delahaye Import Co.*, 69 Misc. 351, 125 N. Y. Supp. 827.

50. *State Trust Co. v. Casino Co.*, 5 App. Div. 381, 39 N. Y. Supp. 258; *Baumann v. Jefferson*, 4 Misc. 147, 23 N. Y. Supp. 685; *Eisler v. Union Transfer and Storage Co.*, 16 Daly 456, 12 N. Y. Supp. 732; *Baumann v. Post*, 16 Daly 385, 26 Abb. N. C. 134, 12 N. Y. Supp. 213; *Allen v. Becket*, 84 N. Y. Supp. 1007; *Singer Mfg. Co. v. Becket*, 85 N. Y. Supp. 391; *Banfield v. Haeger*, 13 J. & S. 428.

A mortgagee upon default in the payment of the mortgage, becomes the absolute owner of the chattels and entitled to the immediate possession thereof as against warehousemen with whom the chattels were

stored by the mortgagor after his default. *Bauman v. Kuhn*, 57 Misc. 618, 108 N. Y. Supp. 773.

51. *State Trust Co. v. Casino Co.*, 5 App. Div. 381, 39 N. Y. Supp. 258; *Industrial Loan Assoc. v. Saul*, 34 Misc. 188, 68 N. Y. Supp. 837.

While, as a general proposition, a creditor cannot attack a mortgage because of failure to refile until execution or legal process against the property, a warehouseman, having possession of the property and a right to retain it for his lien, with a right to sell the same to discharge it, is in a different position than a general creditor, and may assail the mortgage. *State Trust Co. v. Casino Co.*, 5 App. Div. 381, 39 N. Y. Supp. 258.

52. See *Singer Mfg. Co. v. Becket*, 85 N. Y. Supp. 391.

732 of the Laws of 1907) relating to warehouse receipts. This act is now incorporated in the General Business Law.⁵³ It provides that the lien may be enforced: “(a) Against all goods, whenever deposited, belonging to the person who is liable as debtor for the claims in regard to which the lien is asserted, and

(b) Against all goods belonging to others which have been deposited at any time by the person who is liable as debtor for the claims in regard to which the lien is asserted, if such person had been so intrusted with the possession of the goods that a pledge of the same by him at the time of the deposit to one who took the goods in good faith for value would have been valid.”⁵⁴ Under this section, it has been held that a purchase-money mortgagee of chattels is entitled to the possession thereof, upon default by the mortgagor, as against a warehouseman with whom the goods are stored by the mortgagor.⁵⁵

Sec. 4. Subsequent Mortgagee.

A second mortgage is generally a valid security and, after default by the mortgagor, entitles such mortgagee to the possession of the property as against everyone except the first mortgagee.⁵⁶ As against a third mortgagee the second is deemed a first mortgagee.⁵⁷ He can maintain an action for the conversion of the property as against anyone except possibly the first mortgagee.⁵⁸ And the defendant, after the commencement of such an action, cannot secure from the first mortgagee rights which will enable him to defeat the plaintiff's cause of action.⁵⁹ Where the first mortgagee

53. General Business Law, §§ 90-143.

54. General Business Law, § 113.

55. Ludwig, Bauman & Co. v. Roth, 67 Misc. 458, 123 N. Y. Supp. 191.

56. Moore v. Prentiss Tool and Supply Co., 133 N. Y. 144. But see Hulsen v. Walter 34 How. Pr. 385. See also Garrison v. Quick, 38 App. Div. 93, 57 N. Y. Supp. 895.

57. Kimball v. Farmers' and Mechanics' Bank, 138 N. Y. 500.

58. Moore v. Prentiss Tool and Supply Co., 133 N. Y. 144; Kimball v. Farmers and Mechanics' Nat. Bank, 138 N. Y. 500; Columbia Bank v. American Surety Co., 84 App. Div. 487, 82 N. Y. Supp. 1054, *aff'd*, 178 N. Y. 628; Schwab Mfg. Co. v. Aizeman, 106 App. Div. 478, 94 N. Y. Supp. 729.

59. Moore v. Prentiss Tool and Supply Co., 133 N. Y. 144.

has assigned his mortgage to a third party, the second can recover the property from the first.⁶⁰

A second mortgagee may seize and sell mortgaged property, subject to the first mortgage,⁶¹ but may be guilty of conversion if the sale is made in violation of the latter's right.⁶² Where a mortgagee, whose right to possession has become perfected under the mortgage, obtains possession in a lawful manner, and sells the property generally without taking any notice of a prior lien or mortgage, he is not liable in trespass or trover at the suit of the mortgagor or prior lienor or mortgagee.⁶³ Where a mortgagee takes the property from the mortgagor and places it in the custody of another mortgagee upon his promise to return it upon demand, the latter, when sued for the property, cannot claim that his mortgage gives him a prior lien.⁶⁴

A second mortgagee in many cases may attack the prior mortgage for failure of the mortgagee thereof to file⁶⁵ or refile⁶⁶ the same, or upon the ground that it was fraudulent.⁶⁷

A second mortgagee may sue in equity to compel the first mortgagee to assign or cancel his mortgage upon payment of the debt secured thereby.⁶⁸ In such an action the better practice is to

60. *Schwab Mfg. Co. v. Aizenman*, 106 App. Div. 478, 94 N. Y. Supp. 729.

61. *Schwab Mfg. Co. v. Aizenman*, 106 App. Div. 478, 94 N. Y. Supp. 729.

An agreement between two mortgagees of the same property, where the second has taken it for sale, that whatever interest the first mortgagee had should be transferred to the proceeds of the sale and "that such interest stated by" the first mortgagee to be \$712.40 "shall be first paid by the auctioneer out of the proceeds to be realized upon said sale" authorizes the first mortgagee to recover only his interest as shown by the amount due on the mortgage, not

necessarily the sum of \$712.40. *Blumberg v. Marks*, 87 N. Y. Supp. 512.

62. *Lempke v. Peterson*, 1 City Ct. R. 15; *Kleinherger v. Brown*, 26 J. & S. 4, 8 N. Y. Supp. 866.

63. *Hale v. Omaha Nat Bank*, 7 J. & S. 207, *aff'd*, 64 N. Y. 550.

64. *Jones v. Howell*, 3 Rob. 438.

65. See *supra*, the chapter *Filing* p. 58.

66. See *supra*, the chapter *Refiling*, p. 91.

67. *Anderson v. Hunn*, 5 Hun 79. See also *supra*, the chapter *Fraudulent Mortgages*, p. 106.

68. *Bernheimer & Schwartz Pilsener Brewing Co. v. Koehler Co.*, 42 Misc. 377, 86 N. Y. Supp. 716.

tender the amount of the debt, but it is not necessary that such tender be kept good by payment into court.⁶⁹ Where the amount due upon the first mortgage is in dispute, the owner thereof claiming that it covers future advances, a tender by the second mortgagee of the amount due thereon at the time of its execution is effective to give the latter a footing in equity to sue to compel the assignment or cancellation of the mortgage.⁷⁰

69. Bernheimer & Schwartz Pilsener
Brewing Co. *v.* Koehler Co., 42 Misc.
377, 86 N. Y. Supp. 716.

70. Bernheimer & Schwartz Pilsener
Brewing Co. *v.* Koehler Co., 42 Misc.
377, 86 N. Y. Supp. 716.

CHAPTER XI.

ASSIGNMENT AND DISCHARGE OF MORTGAGE.

SEC. 1. Assignment.

- a. In General.
- b. Assignment of Debt.
- c. Subject to Equities.

2. Discharge.

- a. By Payment.
- b. By Taking Other Security.
- c. By Transfer of Mortgaged Property to Mortgagee.
- d. By Assignment of Mortgage to Mortgagor.
- e. By Tender Before Default.
- f. By Tender After Default.
- g. By Mortgagee's Retention of Possession of Property.
- h. By Disposal of Property by Mortgagor.
- i. Release of Property from Lien of Mortgage.
- j. Discharge of Record.

Sec. 1. Assignment.

a. *In General.*—A mortgage with a debt secured thereby is capable of assignment and the assignment carries with it all the rights of the mortgagee to enforce the mortgage.¹ But an assignment made by a person of unsound mind may be avoided by his committee.^{1a} An assignment after default conveys to the assignee a legal title to the mortgaged property.² If absolute in its terms it cannot be shown by parol that it was given to discharge the mortgage.³ An assignment of a chattel mortgage need not be filed.⁴ Where a mortgage for the

1. *Schwab Mfg. Co. v. Aizenman*, 106 App. Div. 478, 94 N. Y. Supp. 729. See also *Zeiter v. Bowman*, 6 Barb. 133; *Corwin v. Wesley*, 2 J. & S. 109.

Assignment of Claim for Conversion.—In order for the assignee of a mortgagee to recover against the mortgagor for selling property covered by a chattel mortgage, it must be shown that the claim was assigned prior to the payment of the mortgage. *Stanwix v. Leonard*, 125 App. Div. 299, 109 N. Y. Supp. 804.

1a. *Schanck v. Hooper*, 160 N. Y. Supp. 627.

2. *Campbell v. Birch*, 60 N. Y. 214.

3. *Tyler v. Taylor*, 8 Barb. 585.

4. *Baxter v. Gilbert*, 12 Abb. Pr. 97. See also *supra*, the section *Necessity of Filing*, p. 60.

A purchaser at an execution sale of the property mortgaged, under an execution against the mortgagee, the judgment obtained and execution issued after the giving and recording

benefit of two persons whose debts are secured thereby, is assigned to a third person who takes the property into his possession, they may compel such third person to account for the property.⁵

b. *Assignment of Debt.* — A chattel mortgage is but an accessory or incident to the debt. An assignment of the debt carries with it the mortgage and the right to enforce the same; if the assignment of the debt is after default it transfers the legal title to the mortgaged property.⁶ And a transfer of a portion of the debt secured by the mortgage passes to the transferee an interest in the mortgage without any formal assignment thereof.⁷ The mortgage cannot exist independently of the debt. If an arrangement is made which separates the two, as a special agreement that the mortgage shall not accompany the debt, the mortgage is, *ipso facto*, extinguished.⁸ But where a mortgage and a note represent the same debt, and the mortgage is assigned without a transfer of the note, the retention of the latter does not conclusively establish that it was not the intention of the assignor to transfer the debt with the mortgage. The mortgage is an incident to the debt, not to the note.⁹

c. *Subject to Equities.* — An assignment of a chattel mortgage is subject not only to the equities between the parties, but also to the equities in favor of third persons against the assignor.¹⁰ Where,

of a bill of sale by the mortgagor to the mortgagee, will acquire no title to the property mortgaged and so sold, as against the vendee of the assignee of the mortgagee, on a sale made in foreclosure of the mortgage assigned. *Baxter v. Gilbert*, 12 Abb. Pr. 97.

5. *Weil v. Levy*, 80 Hun 382, 30 N. Y. Supp. 127.

6. *Langdon v. Buel*, 9 Wend. 80.

7. *Chandless v. Globe Storage and Carpet Cleaning Co.*, 49 Misc. 562, 98 N. Y. Supp. 511.

8. *Langdon v. Buel*, 9 Wend. 80. See also *Merritt v. Bartholick*, 36 N. Y. 44.

9. *Campbell v. Birch*, 60 N. Y. 214.

10. *David Stevenson Brewing Co. v. Iba*, 155 N. Y. 224; *Zeiter v. Bowman*, 6 Barb. 133. See also *Owen v. Evans*, 134 N. Y. 514.

An assignee in good faith and for value of a filed chattel mortgage has no greater rights than his assignor possessed, and is entitled to no preference over a subsequently filed prior mortgage, when his assignor could not claim priority because of notice or any other equity, as, when his assignor had agreed with the mortgagee of the prior unfiled mortgage, that it should be the first lien. *David Stevenson Brewing Co. v. Iba*, 155 N. Y. 224.

pending an action to foreclose a real estate mortgage, a person leased the premises from the mortgagor and gave him a chattel mortgage to secure the rent, which chattel mortgage was subsequently assigned to a third person, it was held that the assignee took the assignment subject to infirmities which would attach by reason of the foreclosure proceedings, although he was not a party to such suit.¹¹

A *bona fide* purchaser, before maturity, of a negotiable promissory note, secured by a chattel mortgage, takes the mortgage as he takes the note, free from any equities which existed in favor of third parties while it was held by the mortgagee.¹²

Sec. 2. Discharge.

a. *By Payment.* — A chattel mortgage is discharged upon payment of the debt secured thereby.¹³ Where there are successive mortgages upon the same property, and the debtor or any one standing in his place with notice of the subsequent pays off the prior, it is extinguished as against the second mortgage and as against any one subsequently deriving title under the owner of the equity of redemption.¹⁴ But, in some cases, where the owner of the equity of redemption has paid off a mortgage on the property, equity will treat the incumbrance as alive and the person who has paid it as succeeding to the rights of the mortgagee; but this will be done only when it will uphold the innocent purpose of the person so paying and will be injurious to no one.¹⁵ Where a mort-

11. *Zeiter v. Bowman*, 6 Barb. 133.

12. *Gould v. Marsh*, 1 Hun 566, 4 T. & C. 128. But see *Henry Elias Brewing Co. v. Boeger*, 132 N. Y. Supp. 286, holding that, though the rule might be that the assignee of a mortgage securing a negotiable note takes the same free from the equities between the original parties to the mortgage, the equities of third parties were not affected.

13. A release from all liability on a note, to secure the amount of which

a chattel mortgage is given as collateral security, discharges the mortgage. *Blodgett v. Wadhams*, Hill & D. Supp. 65.

14. *Thompson v. Van Vechten*, 27 N. Y. 568, holding that a chattel mortgage is extinguished by a payment made with the mortgagor's money by one who purchases the chattel at a sheriff's sale to aid the debtor in defrauding his creditors.

15. *Doolittle v. Naylor*, 2 Bosw. 206.

gatee, who has taken a mortgage as security for the payment of a note indorsed by him, is compelled to pay the note when it becomes due, and to save the credit of the drawers gives his check to take up the note instead of suffering it to be protested, the debt for which the mortgage was given is not extinguished, and the mortgage remains a valid lien for the security of the amount due the mortgagee.¹⁶

A chattel mortgage given as collateral security for the payment of a note remains as security for the notes given in renewal of the original note.¹⁷ And where a mortgage is given to secure a loan and other loans that may afterwards be made, it is not, on payment of the first loan, defeated as security for another loan outstanding at the time of such payment, though the mortgagee takes another mortgage on different property to secure the latter loan.¹⁸ But where the debts and liabilities of the mortgagors, or the balance of the account against them, which the mortgage is given to secure, are paid at any time, that satisfies and extinguishes the mortgage, and the security cannot receive fresh sustenance from dealings between the mortgagee and the firm which succeeds the mortgagors.¹⁹

Where a mortgagee has directed the mortgagor to sell the property and has actually received the proceeds, it is presumed, in the absence of any other application, that they have been applied to extinguish the lien of the mortgage.²⁰ Where a person has mortgages on both real and personal property, and the insurance on

16. *Rogers v. Traders' Ins. Co.*, 6 Paige 583.

17. *Commercial Bank of Rochester v. Davy*, 81 Hun 200, 30 N. Y. Supp. 718. See also *Hill v. Beebe*, 13 N. Y. 556.

Mortgage to Secure Surety.—Where a chattel mortgage is given to secure the surety and indorser of a note made by the mortgagor, and such note, after being protested for non-payment, is paid out of the proceeds of a new note made by the mortgagor,

and indorsed by the mortgagees for that express purpose, the mortgage is not discharged by the payment of the original note, but continues in force as a security to the mortgagees for the payment of the second. *Chapman v. Jenkins*, 31 Barb. 164.

18. *Burritt v. Sheffer*, 13 N. Y. Supp. 849, 37 St. Rep. 591.

19. *Monnot v. Ibert*, 33 Barb. 24.

20. *Stanwix v. Leonard*, 125 App. Div. 299, 109 N. Y. Supp. 804.

the personality is payable to the mortgagee as his interest in the property may appear, insurance moneys arising from the personality are applicable in the first instance to the chattel mortgage, not to the real estate mortgage debt.²¹ In the absence of evidence that a mortgagee authorized her husband's debts to the mortgagor to be credited on the mortgage debt, such debts cannot be treated as a payment thereon.²²

b. *By Taking Other Security.*—A mortgage is not deemed merged or extinguished because the mortgagee takes other security for the same indebtedness, unless there is an express agreement that such shall be the effect of the subsequent security.²³ Thus, it is held that a mortgage is not discharged by a subsequent mortgage upon the same property to secure the same indebtedness;²⁴ or by a note for the debt,²⁵ or a judgment recovered thereupon.²⁶ Where a chattel mortgage provided that the mortgagor was to assign to the mortgagee a mortgage on certain real estate in lieu of the chattel mortgage, and the real estate mortgage when assigned did not

21. *Sberman v. Foster*, 158 N. Y. 587.

22. *Niccloy v. Treasure*, 115 N. Y. Supp. 1030.

23. *Miller v. Lockwood*, 32 N. Y. 293; *Chapman v. Jenkins*, 31 Barb. 164; *Westcott v. Gunn*, 4 Duer 107; *Gregory v. Thomas*, 20 Wend. 17.

The court will always look to the real nature of the transaction, and will not consider a mortgage discharged by the mere change, or even the destruction of another security for the same debt, if it was not the intention of the parties to destroy the lien of the mortgage. *Rogers v. Traders' Ins. Co.*, 6 Paige 583.

24. *Hill v. Beebe*, 13 N. Y. 556; *Shuler v. Boutwell*, 18 Hun 171; *Bissell v. Pearce*, 21 How. Pr. 130.

A second mortgage for the same debt does not extinguish the first; to render the second security a bar to the first, there must be a release

express or at least implied from a covenant not to sue. *Gregory v. Thomas*, 20 Wend. 17.

25. *Hill v. Beebe*, 13 N. Y. 556; *Westcott v. Gunn*, 4 Duer 107; *Sinclair v. Wood*, 13 Week. Dig. 323.

The holder of a mortgage does not waive his right to enforce it by taking a note from the mortgagor and transferring it to a third party by his indorsement; if the note is not paid at maturity, the mortgagee has a legal right to enforce the mortgage for the payment of the debt. *Sinclair v. Wood*, 13 Week. Dig. 323.

26. *Butler v. Miller*, 1 N. Y. 496; *Terry v. Marshall*, 16 Week. Dig. 87.

A judgment confessed by the mortgagor to the mortgagee for the same debt secured by a personal mortgage, does not merge or extinguish the mortgage, where by agreement the judgment is taken as collateral merely. *Butler v. Miller*, 1 N. Y. 496.

cover all the premises specified, it was held that the real estate mortgage was not substituted for the chattel mortgage and the latter might still be a lien upon the personality and enforceable accordingly.²⁷

c. *By Transfer of Mortgaged Property to Mortgagee.*—A transfer of the mortgaged property by the mortgagor to the mortgagee does not discharge the mortgage where the mortgagee has previously assigned the mortgage to a third person.²⁸ And where the mortgagor, after giving a bill of sale of the property to the mortgagee, gives a second mortgage on the property which is accepted by the same mortgagee, even if the bill of sale be considered as discharging the first mortgage, the second may be deemed a recognition of the prior and reinstates and renews it as it previously existed.²⁹ Where the mortgagor transfers the mortgaged property to the mortgagee and the latter executes and delivers a satisfaction of the mortgage, the mortgage is deemed discharged as against another mortgage upon the property at the time of the transfer of the property to the mortgagee; but the mortgagee, if the mortgagor fraudulently concealed the existence of the other mortgage, may maintain an action to set aside the satisfaction.³⁰

d. *By Assignment of Mortgage to Mortgagor.*—An assignment of the mortgage by the mortgagee to the mortgagor discharges the same.³¹ Thus, where a chattel mortgage was executed by a corporation upon certain machinery, and a mortgage upon the real estate to which the machinery was attached was foreclosed and the premises sold to a third party, and thereafter the chattel mortgage was assigned to the corporation, it was held that the mortgage was discharged and that the corporation was merely restored to its original rights as respects the title of the property.³²

27. *Shaw v. Cooke*, 111 App. Div. 202, 97 N. Y. Supp. 235.

28. *Baxter v. Gilbert*, 12 Abb. Pr. 97.

29. *Walker v. Henry*, 85 N. Y. 130.

30. *Lynch v. Tibbets*, 24 Barb. 51; *Lambert v. Leland*, 2 Sweeney 218.

31. *Phoenix Mills v. Miller*, 4 St. Rep. 787, 25 Week. Dig. 290.

32. *Phoenix Mills v. Miller*, 4 St. Rep. 787, 25 Week. Dig. 290.

The purchase by the executrix of a deceased partner of a mortgage against the firm is not a payment thereof, and the surviving partner cannot enjoin a suit to foreclose the same.³³ And where one bids off, at a sheriff's sale on execution, property of the judgment debtor, embraced in a chattel mortgage previously executed by such debtor, the sale being subject to the mortgage, and subsequently purchases and takes an assignment of the mortgage, the transaction will not operate as a payment or satisfaction of the mortgage. If the mortgage has not been paid or foreclosed, nor any power contained in it exercised, at the time of its transfer, it will be a valid, subsisting, unsatisfied mortgage, and no fraud can be imputed to the assignee, in representing and claiming that it is unpaid. The purchaser in such a case can either pay off the mortgage and thus protect his purchase or purchase it and take an assignment and protect himself in that manner. If he pays off the mortgage it will be extinguished, and cannot be enforced against any other property contained in it. If he does not pay, but takes it by purchase and assignment, it is an operative and valid instrument in his hands.³⁴

e. *By Tender Before Default.* — A tender of the amount due on a real estate mortgage discharges the lien of the mortgage. But, in the case of a chattel mortgage, there is, strictly speaking, no lien, and the property can be held free from the mortgage only by payment or by keeping the tender good.³⁵

f. *By Tender After Default.* — Upon default, the absolute legal title to the mortgaged chattels passes to the mortgagee. A tender of payment of the debt does not reinvest the mortgagor with title

33. *Loewenstein v. Loewenstein*, 114 App. Div. 65, 99 N. Y. Supp. 730.

34. *Brown v. Rich*, 40 Barb. 28.

35. *Noyes v. Wyckoff*, 30 Hun 466, *aff'd*, 114 N. Y. 204.

When tendering the amount of notes which are not yet due and secured by mortgage, where the notes are negotiable, the mortgagor may re-

quire that the notes be delivered up as a condition of the delivery of the money. The tender will be good when so made, and if the mortgagee thereafter takes the property, the mortgagor may redeem and recover as damages the value thereof. *Cutler v. James Gould Co.*, 43 Hun 516, 7 St. Rep. 106.

to the property.³⁶ The mortgagee may refuse the tender and then the only remedy of the mortgagor is a suit in equity to redeem the mortgage.³⁷ He has no remedy at law.³⁸ But if the mortgagee accepts the tender he waives the forfeiture, and the title to the property reverts in the mortgagor.³⁹

g. By Mortgagee's Retention of Possession of Property. — Where the mortgagee seizes the property and retains the same without foreclosing the mortgage, the debt is generally satisfied,—at least to the extent of the value of the mortgaged property. This question is discussed in another place in this work.⁴⁰

h. By Disposal of Property by Mortgagor. — A chattel mortgage may be valid though the mortgagor is allowed to sell or dispose of the property where the proceeds thereof are to be paid to the mortgagee. In such a case the mortgagor is considered a mere agent of the mortgagee and the proceeds of the property are deemed, as against third persons interested in the property, to be applied on the mortgage indebtedness, though, in fact, the mortgagor has retained such proceeds to his own use. This question is considered in connection with the discussion of the validity of mortgages authorizing the mortgagor to dispose of the mortgaged property.⁴¹

i. Release of Property from Lien of Mortgage. — A release of property from the lien of a chattel mortgage, though given without

36. *Campbell v. Birch*, 60 N. Y. 214; *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037; *Olcott v. Tioga R. Co.*, 40 Barb. 179, *aff'd*, 27 N. Y. 546; *Charter v. Stevens*, 3 Denio 33; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr. N. S. 104, *rev'd* on other grounds, 52 N. Y. 185; *Brown v. Bement*, 8 Johns. 96; *Rogers v. Traders' Ins. Co.*, 6 Paige 583.

Div. 426, 60 N. Y. Supp. 174; *Porter v. Parmley*, 43 How. Pr. 445, 13 Abb. Pr., N. S., 104, *rev'd* on other grounds, 52 N. Y. 185; *Rogers v. Traders' Ins. Co.*, 6 Paige 583.

37. *Charter v. Stevens*, 3 Denio 33; *Patchin v. Pierce*, 12 Wend. 61. See also *supra*, the section *Waiver of Default*, p. 139.

38. *West v. Crary*, 47 N. Y. 423; *Charter v. Stevens*, 3 Denio 33; *Patchin v. Pierce*, 12 Wend. 61. See also *supra*, the section *Satisfaction of Debt Thereby*, p. 144.

39. *Earle v. Gorham Mfg. Co.*, 2 App. Div. 460, 37 N. Y. Supp. 1037; *Halstead v. Swartz*, 1 T. & C. 559; *Patchin v. Pierce*, 12 Wend. 61.

40. See *supra*, the section *Satisfaction of Debt Thereby*, p. 144.

41. See *supra*, the subdivision *Reservation by Mortgagor of Disposal of Property*, p. 108.

42. *Darrow v. Wendelstadt*, 43 App.

consideration, is not void if the same is a voluntary and executed gift; and a delivery of the mortgage, where it covers property other than that released, is not necessary to consummate the gift, a delivery of the release being all that is required.⁴²

Where the purchaser of mortgaged property pays a portion of the consideration of the sale to the mortgagee, upon an understanding of all the parties that the mortgagee should relinquish his claim on the property and look to the mortgagor for the balance, though the mortgagee gives no formal discharge he cannot afterwards enforce the mortgage against the purchaser.⁴³

j. *Discharge of Record.* — “Upon the payment or satisfaction of a chattel mortgage, the mortgagee, his assignee or legal representative, upon the request of the mortgagor or of any person interested in the mortgaged property, must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer with whom the mortgage, or a copy thereof, is filed, must, on receipt of such certificate, file the same in his office, and write the word “discharged” in the book where the mortgage is entered, opposite the entry thereof, and the mortgage is thereby discharged.”⁴⁴

A mortgagee may maintain an action to set aside a discharge where it is procured by fraud.⁴⁵

42. *Kennedy v. Strobel*, 77 Hun 96, 28 N. Y. Supp. 452.

43. *Rickerson v. Raeder*, 4 Abb. 492. *Lambert v. Leland*, 2 Sweeney 218. Dec. 60, 1 Keyes 492.

44. *Lien Law*, § 238.

45. *Lynch v. Tibbets*, 24 Barb. 51;

CHAPTER XII.

PROOF OF MORTGAGE.

Section 237 of the Lien Law provides that "a copy of any such original instrument, or of a copy thereof, including any statement relating thereto, certified by the officer with whom the same is filed may be received in evidence, but only of the fact that such instrument, or copy, or statement was received and filed according to the indorsement thereon; and the original indorsement upon such instrument or copy may be received in evidence only of the facts stated in such indorsement." It is provided in the Code of Civil Procedure that "a copy of a paper filed, pursuant to law, in the office of a town clerk, or a transcript from a record kept therein, pursuant to law, certified by the town clerk, is evidence, with like effect as the original."¹

But these statutory provisions do not dispense with common-law proof of the execution of the instrument.² Until the original mortgage is proved, a certified copy of the original is not admissible.³

1. Code of Civil Procedure, § 934.

3. Maxwell *v.* Inman, 42 Hun 265;

2. Phoenix Mills *v.* Miller, 4 St. Rep.

Fellows *v.* Van Hyring,

23 How. Pr. 787, 25 Week. Dig. 290; Bissell *v.* 230.

Pearce, 28 N. Y. 252.

CHAPTER XIII.

MORTGAGE ON STOCK OF GOODS.

Where a mortgage upon a stock of goods or merchandise is drawn in the usual form and the mortgagee is empowered to retain possession thereof and sell the goods for his own benefit, it is fraudulent as to creditors. By the rules of law, it is impossible to place a valid chattel mortgage upon such property and at the same time afford the mortgagor a fair opportunity for the continuance of his business.¹

To remedy this situation, in 1911 section 45, providing for liens on merchandise, was added to the Personal Property Law, and section 230 of the Lien Law was amended so as to exclude such mortgages from the operation of article X of the Lien Law when the provisions of such section 45 are complied with.

Section 45 of the Personal Property Law provides as follows: "Liens upon merchandise or the proceeds thereof created by agreement for the purpose of securing the repayment of loans or advances made or to be made upon the security of said merchandise and the payment of commissions or other charges provided for by such agreement, shall not be void or presumed to be fraudulent or void as against creditors or otherwise, by reason of want of delivery to or possession on the part of the lienor, whether such merchandise shall be in existence at the time of the creation of the lien or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the person creating the lien, provided there shall be placed and maintained in a conspicuous place at the entrance of every building or place in or at which such merchandise, or any part thereof, shall be located, kept or stored,

1. See *supra*, the subdivision *Reservation by Mortgagor of Disposal of Property*, p. 108.

a sign on which is printed in legible English, the name of the lienor and a designation of said lienor as lienor, factor or consignee, and provided further that a notice of the lien is filed, stating:

“ 1. The name of the lienor, and the name under which the lienor does business, if an assumed name; the principal place of business of the lienor within the State; and if the lienor is a partnership or association the names of the partners, and if a corporation the State under whose laws it was organized.

“ 2. The name of the person creating the lien, and the interest of such person in the merchandise, as far as known to the lienor.

“ 3. The general character of merchandise subject to the lien, or which may become subject thereto, and the period of time during which such loans or advances may be made under the terms of the agreement creating the lien.

“ Such notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge. It must be filed with the officer designated in section two hundred and thirty-two of the Lien Law, in every town or city where the merchandise subject to the lien, or any part thereof, is or at any time shall be located, kept or stored, and also in the town or city where the principal office or place of business of the lienor within the State is or at any time shall be located. Such officers shall file every such notice presented to them for that purpose and shall endorse thereon its number and the time of its receipt. They shall enter in a book provided for that purpose, in separate columns, the names of the parties named in each notice so filed under the head of ‘owners’ and ‘lienors,’ the number of such notice and the date of the filing thereof, and the general character of the merchandise as therein stated. The names of the persons creating the liens, as stated in the notice, shall be arranged in alphabetical order under the head of ‘owners.’ Such officers at the time of filing such notice shall upon request issue to the person filing the same a receipt in writing, containing the substance of the entries made or to be made as hereinabove provided. Such officers shall be entitled to receive for their services here-

under, fees at the same rates as provided in section two hundred and thirty-four of the Lien Law.

“ Such notice may be filed at any time after the making of the agreement, and shall be effectual from the time of the filing thereof as against all rights of third parties thereafter arising. Upon the payment or satisfaction of indebtedness secured by any lien specified in this section, the lienor or his legal representative, upon the request of any person interested in the said merchandise, must sign and acknowledge a certificate setting forth such payment or satisfaction. The officer or officers with whom the notice of lien is filed must, on receipt of such certificate or a copy thereof certified as required by law, file the same in his office and write the word ‘ discharged ’ in the book where the notice of lien is entered opposite the entry thereof, and the lien is thereby discharged.

“ If the agreement creating such lien shall also give the lienor a right to or lien upon accounts receivable resulting from or which may result from a sale or sales of the merchandise subject to the lien, or of part of such merchandise, such right or lien shall not be void or ineffectual as against creditors or otherwise, by reason of want of possession of any such account on the part of the lienor or by reason of failure to make or deliver a further assignment of any such account, provided a bill, invoice, statement or notice shall be mailed, sent or delivered to the person owing such account receivable, stating or indicating that the account is payable to the lienor, and such mailing, sending or delivery of such bill, invoice, statement or notice shall have the same effect as a formal assignment of such account to the lienor named therein.”

CHAPTER XIV.

MORTGAGES OF VESSELS.

SEC. 1. In General.
2. Distinguished from Bottomry Bonds.
3. Admiralty Jurisdiction of Mortgages on Vessels.
4. Filing.
 a. Statute.
 b. Construction of Statute.
 c. Vessels to Which Statute Is Applicable.
5. Priority of Mortgage.
6. Liability for Supplies, etc.
7. Right to Earnings of Vessel.

Sec. 1. In General.

A mortgage upon a vessel is similar to other chattel mortgages except that it must be registered as required by the federal law.¹ The nature of the chattel mortgaged, however, causes different questions to arise, such as its priority over maritime liens, the liability of the mortgagee for supplies furnished to or for labor upon the vessel, and the right of the mortgagee to its earnings.

A mortgagee of a vessel has the legal title and the right to the possession thereof.²

Where the mortgagor of a vessel, after the execution of the mortgage, removed sails, which were old and nearly worn out, and replaced them with a new set, and in that state the vessel came into the possession of the mortgagee, it was held that the new

1. "A mortgage upon a vessel in this country is precisely like other chattel mortgages except that it must be registered as required by the federal law." *Per Earl, J.*, in *Kimball v. Farmers & Mechanics' Nat. Bank*, 138 N. Y. 500.

2. *Philips v. Ledley*, 1 Wash. C. C. 226, Fed. Cas. No. 11,096.

The legal title and right to immediate possession of a vessel under an absolute bill of sale, given to secure a loan and registered as a mortgage, is vested in the mortgagee. *The J. B. Lunt*, Fed. Cas. No. 7,246.

sails were covered by the mortgage, and upon a sale of the vessel under the mortgage belonged to the purchaser, as a part of the vessel.³

Sec. 2. Distinguished from Bottomry Bonds.

Bottomry is a contract by which the owner of a ship hypothecates or binds the ship as security for the repayment of money advanced for the use of the ship. It is defined to be a contract in the nature of a mortgage of a ship, on which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed, and he pledges the keel or bottom of the ship, *paris pro toto*, as a security for the repayment; and it is stipulated, if the ship should be lost in the course of the voyage by any of the perils enumerated in the contract, the lender also shall lose his money; but if the ship should arrive in safety, then he shall receive back his principal and also the interest agreed upon, generally called marine interest.⁴ An essential character of bottomry

3. *Southworth v. Isham*, 3 Sandf. 448.

4. *Braynard v. Hoppock*, 32 N. Y. 572.

Bottomry Bond.—In *Cable v. White*, 26 Wend. 511, Senator Verplank said: “A bottomry bond is a bond for a loan of money, upon the security of a vessel and its accruing freight; its payment being dependent upon maritime risks, to be borne by the lender. The condition of the bond is the safety of the hypothecated vessel. The loan is on condition, that if the vessel hypothecated be lost by the perils of the sea, the lender shall not be repaid. It is for a specific time; and as it substitutes the risk of the adventure to the unconditional responsibility of the borrower, the rate of interest is universally (though not of necessity) such as would without that risk be usurious. The lender becomes to that amount an insurer.

The forms of the bonds vary; they more commonly with us, I believe, specify the risks assumed, which resemble those of the insurer; but some of the older forms covenant merely that the bond is to become absolute, with a certain rate of interest, or with a specified premium. On the safe completion of the voyage or the safety of the ship at the expiration of the specified time.”

Personal Liability of Master.—A bottomry bond is valid though the master is personally liable for the payment of the debt if the vessel arrives safely. *Kelly v. Cushing*, 48 Barb. 269.

Respondentia Bond.—A *respondentia* bond is similar to a bottomry bond except that it binds the merchandise upon the vessel instead of the vessel itself. *Maitland v. The Atlantic*, Newb. Adm. 514, Fed. Cas. No. 8,980.

is that the money lent is at the risk of the lender during the voyage, and the repayment thereof depends on the event of the successful termination of the voyage. It is the very essence of the contract that the lender runs the risk of the voyage, and that both principal and interest be at hazard. If, at the time the money becomes payable, the vessel is lost, the lender cannot recover either principal or interest, and where her arrival in safety entitles him to repayment, he is confined to the security of the ship, and cannot enforce his claim, personally, against the owner, beyond the value of the pledged fund which may come into his hands. It is no bottomry where the money is payable, at all events; for the principal and extraordinary interest reserved is not put absolutely at hazard by the perils of the voyage. The lender must run the maritime risk to earn the maritime interest. If, by the terms of the contract, the owner binds himself, personally, to repay the loan, or there be collateral security for its absolute repayment, it is not a bottomry loan.⁵ An instrument may be construed as a bill of bottomry though it not only pledges the ship, but "grants, bargains and sells" her to the creditor.⁶

5. *Braynard v. Hoppock*, 32 N. Y. 572; *Northwestern Ins. Co. v. Ferward*, 36 N. Y. 139; *Cole v. White*, 26 Wend. 511. See also *The Clifton*, 143 Fed. 460.

The essential difference between a bottomry bond and a simple loan is, that in the latter the money is at the risk of the borrower, and must be paid at all events; in the former, it is at the risk of the lender during the voyage, and the right to demand payment depends on the safe arrival of the vessel. And if the lender of money on a bottomry or *respondentia* bond be willing to stake the money upon the safe arrival of the ship or cargo, and to take upon himself, like

an insurer, the risk of sea perils, it is lawful, reasonable and just that he should be authorized to demand and receive an extraordinary interest, to be agreed on, and which the lender shall deem commensurate to the hazard he runs. But a bond executed as an hypothecation, but not upon the principles which govern such securities, is not a bottomry bond, capable of being enforced in a court of admiralty, but must be proceeded upon as at common law. *Maitland v. The Atlantic, Newb. Adm.* 514, Fed. Cas. No. 8,980.

6. *Robertson v. United Ins. Co.*, 2 Johns. Cas. 250.

Sec. 3. Admiralty Jurisdiction of Mortgages on Vessels.

A bottomry bond is a maritime contract,⁷ but a mere mortgage upon a vessel has none of the characteristics of such a contract and is not in this country a subject of admiralty jurisdiction.⁸ But where a vessel has been libeled and sold by a court of admiralty in the enforcement of the maritime claim, the surplus, after satisfaction of the maritime claim, will be distributed to the persons entitled thereto, and in such distribution the court recognizes liens other than maritime, such as pledges and mortgages.⁹ Admiralty has jurisdiction of a suit by a mortgagee to reclaim the vessel from one wrongfully taking the same.¹⁰

Sec. 4. Filing.

a. *Statute.* — Several sections of the U. S. Revised Statutes relate to the filing of mortgages on vessels. Section 4192 provides: "No bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation, or conveyance is recorded in the office of the collector of the customs where such vessel is

7. *Bogart v. The John Jay*, 17 How. (U. S.) 399.

8. *Bogart v. The John Jay*, 17 How. (U. S.) 399; *The J. E. Rumbell*, 148 U. S. 15; *The Guiding Star*, 9 Fed. 521; *The Guiding Star*, 18 Fed. 263; *The Clifton*, 143 Fed. 460.

A mortgage to secure the purchase money of a vessel is not a maritime debt and does not import a maritime lien. *The Madrid*, 40 Fed. 677.

9. *American Trust Co. v. W. & A. Fletcher Co.*, 173 Fed. 471, 97 C. C. A. 477.

An ordinary mortgage of a vessel, whether made to secure the purchase money upon the sale thereof or to raise money for general purposes, is

not a maritime contract. A court of admiralty, therefore, has no jurisdiction of a libel to foreclose it, or to assert either title or right of possession under it. But it has jurisdiction, after a vessel has been sold by its order, and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims, upon petitions such as were filed by the mortgagees and the material-men in this case. *The J. E. Rumbell*, 148 U. S. 15.

10. *The J. B. Lunt*, Fed. Cas. No. 7,246.

registered or enrolled. The lien by bottomry on any vessel, created during her voyage, by a loan of money or materials necessary to repair or enable her to prosecute a voyage, shall not, however, lose its priority, or be in any way affected by the provisions of this section.”¹¹

Section 4193 provides for the acknowledgment and recording of such mortgages, as follows: “The collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and also, all certificates for discharging and canceling any such conveyances, in books to be kept for that purpose, in the order of their reception; noting in such books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received; and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page recorded; and shall receive, for so recording such instrument of conveyance or certificate of discharge, fifty cents; but no bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage or other incumbrance of any vessel, shall be recorded, unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgment of deeds.”¹²

Section 4194 provides for the indexing of the records. Its provisions are as follows: “The collectors of the customs shall keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the purchaser or mortgagee, and shall permit such index and books of records to be inspected during office hours, under such reasonable regulations as they may establish, and shall, when required, furnish to any person a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each, if inserted in the register or enrollment, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel, recorded since the issuing of the last register or enroll-

11. Originally, Act July 29, 1850, c. 27, sec. 1; 9 Stat. 440.

12. Originally, Act July 29, 1850, c. 27, sec. 2; 9 Stat. 440.

ment, viz., the date, amount of such incumbrance, and from and to whom, or in whose favor made. The collector shall receive for each such certificate one dollar.”¹³

b. *Construction of Statute.*—The federal statute is constitutional.¹⁴ It is a registration act excluding all State legislation in respect to the same subject.¹⁵ If a mortgage of the class covered by the federal statute is duly recorded according to such statute, a failure to comply with a State statute relative to filing will not affect the priority of the mortgage.¹⁶ And a filing pursuant to a state law will not excuse the failure of a mortgagee to record the instrument according to the federal law.^{16a} A mortgage cannot be recorded unless acknowledged.¹⁷

The home port of the vessel is the place where the mortgage should be recorded.¹⁸ The port of the last registration or enrollment, when such is not the home port, is not the proper place.¹⁹ A re-registry at a different port does not necessitate the recording in the collector’s office at that port.²⁰

A failure to record a mortgage on a vessel, by the express language of the act, does not affect its lien as against the mortgagor, his heirs and devisees or persons having actual knowledge thereof.²¹

13. Originally, Act July 29, 1850, c. 27, sec. 3; 9 Stat. 440.

Abolishment of Fees.—The fees prescribed by sections 4193 and 4194 were abolished by Act June 19, 1886, c. 421. Such act provides that the collector of customs may receive such fees from the Secretary of Treasury.

14. *White’s Bank v. Smith*, 7 Wall. 646; *Blanchard v. The Martha Washington*, 1 Cliff. 463, Fed. Cas. No. 1,513.

15. *Aldrich v. Aetna Co.*, 8 Wall. 491.

Statute Gives No Maritime Lien.—The statute is simply a registry statute; it does not give a maritime lien to a mortgage. *The Madrid*, 40 Fed. 677.

16. *White’s Bank v. Smith*, 7 Wall. 646; *Aldrich v. Aetna Ins. Co.*, 8 Wall. 491, *rev’d* *Aetna Ins. Co. v. Aldrich*, 26 N. Y. 92; *Folger v. Weber*,

16 Hun 512. Compare *Thompson v. Van Vechten*, 5 Abb. Pr. 458, *rev’d*, 6 Bosw. 373, *mod.*, 27 N. Y. 568.

16a. *Ellis v. Rickett*, 177 App. Div. 411, 164 N. Y. Supp. 243.

17. *The John T. Moore*, 3 Woods 61, Fed. Cas. No. 7,430.

18. *White’s Bank v. Smith*, 7 Wall. 646; *Blanchard v. The Martha Washington*, 1 Cliff. 463, Fed. Cas. No. 1,513; *The John T. Moore*, 3 Woods 61, Fed. Cas. No. 7,430.

19. *White’s Bank v. Smith*, 7 Wall. 646.

20. *The Avalon*, 169 Fed. 696.

21. *Moore v. Simonds*, 100 U. S. 145; *Baumgartner v. The W. B. Cole*, 49 Fed. 587.

Subsequent Mortgagee.—Where the mortgagee of a mortgage on a vessel, which is recorded in the proper custom-house, has notice of a prior unrecorded mortgage, his mortgage is

If the mortgage is recorded, a failure to index it does not destroy its priority.²²

c. *Vessels to Which Statute Is Applicable.* — The Federal statute applies only to vessels of the United States.²³ The validity of a mortgage executed in Nova Scotia upon a British registered vessel is governed by the rules of the Common Law, not by the provisions of the Revised Statutes.²⁴ A vessel is not a vessel of the United States until she is enrolled and licensed as such.²⁵ A canal boat is not a "vessel of the United States."²⁶ If the federal statute is not applicable to the vessel, the mortgage must be filed or recorded as required by the State statute.²⁷ A recital in the mortgage that she is a vessel of the United States and its recording in the custom house do not bind a person who seeks a priority over the mortgage because it was not filed according to the State law.²⁸

Sec. 5. Priority of Mortgage.

A mortgage upon a vessel, though it is properly recorded, is inferior to all strictly maritime liens, whether the latter arose before or after the execution of the mortgage.²⁹ Of such liens are

postponed to the unrecorded mortgage. The John T. Moore, 3 Woods 61, Fed. Cas. No. 7,430.

Execution Creditor of Vendor of Vessel. — If not recorded as required by the federal statute, a bill of sale or conveyance of a vessel is void as against an execution creditor of the vendor, unless such creditor at the time of levying his execution has actual knowledge of such bill of sale or conveyance. Parker Mills *v.* Jacob, 8 Bosw. 161.

Personal Liability of Owner. — The failure to record the conveyance does not affect the personal liability of the owner to pay the debt, it affects only the question of the priority of liens on the vessel. Mott *v.* Ruckman, 3 Blatchf. 71, Fed. Cas. No. 9,881.

22. The W. B. Cole, 59 Fed. 182, 8 C. C. A. 78, 16 U. S. App. 334.

23. Best *v.* Staple, 61 N. Y. 71; Hicks *v.* Williams, 17 Barb. 523; The Ella B., 26 Fed. 111.

24. Fairbanks *v.* Bloomfield, 5 Duer 434.

25. Best *v.* Staple, 61 N. Y. 71; Thurber *v.* The Fannie, 8 Ben. 429, Fed. Cas. No. 14,014.

26. Witherbee *v.* Taft, 51 App. Div. 87, 64 N. Y. Supp. 347; Hicks *v.* Williams, 17 Barb. 523.

27. Best *v.* Staple, 61 N. Y. 71.

28. Best *v.* Staple, 61 N. Y. 71.

29. The Josephine Spangler, 9 Fed. 773; The De Smet, 10 Fed. 483; Baldwin *v.* The Bradish Johnson, 3 Woods 582; Crosby *v.* The Oriental, Fed. Cas. No. 3,424-a; The Hendrick Hudson, Fed. Cas. No. 6,358; Marsh *v.*

those for advances of funds for the necessities of the vessel in a foreign port; ³⁰ for insurance premiums upon the vessel; ³¹ for seamen's wages; ³² and for foreign supplies and repairs. ³³ A mortgage, however, is entitled to preference over debts of the owner which are not liens upon the vessel. ³⁴

State statutes sometimes give a lien for certain claims for which a lien is not given by the general maritime law. Of such claims are those for supplies or repairs furnished a vessel at its home port. Such a State lien is enforceable in the admiralty courts. ³⁵ Whether such a lien given by a State statute is superior to a prior mortgage was the subject of diverse decisions until it was finally held by the Supreme Court of the United States that such a lien took precedence over a prior mortgage though the latter was recorded as prescribed by the Federal statute. ³⁶

The Winnie, Fed. Cas. No. 9,117; Schuchardt *v.* The Angelique, Fed. Cas. No. 12,483-b; Schuchardt *v.* The Angelique, Fed. Cas. No. 12,483-c.

30. The Emily Souder, 17 Wall. (84 U. S.) 666.

31. The Guiding Star, 9 Fed. 521. But see The John T. Moore, 3 Woods 61, Fed. Cas. No. 7,430, holding that there is no maritime lien for the premium due on a policy of insurance taken on a vessel by her owners.

32. The Guiding Star, 9 Fed. 521; The Live Oak, 30 Fed. 78; The Conveyor, 147 Fed. 586.

Stevedore. — The services of a stevedore are maritime in their character, and, when performed for a foreign ship, entitle him to a lien thereon for their value. The Canada, 7 Sawy. 173, 7 Fed. 248.

Watchman. — The wages of a watchman employed on a vessel while lying-up in port are not a maritime lien. The John T. Moore, 3 Woods 61, Fed. Cas. No. 7,430.

33. The Guiding Star, 9 Fed. 521;

The Scotia, 35 Fed. 907; American Trust Co. *v.* W. & A. Fletcher Co., 173 Fed. 471, 97 C. C. A. 477; The Favorite, 3 Sawy. 405, Fed. Cas. No. 4,699.

Supplies. — To constitute a maritime lien for supplies, they must be furnished on the credit of the vessel and in some other than her home port. The Thomas Fletcher, 24 Fed. 375.

Foreign Port. — A vessel is in a foreign port, in the sense of the maritime law, when she is in a port without the State where she belongs and her owner resides. The Canada, 7 Sawy. 173, 7 Fed. 248.

34. The Avalon, 169 Fed. 696.

35. The Lottowanna, 21 Wall. 558; The John Farron, 14 Blatchf. 24.

36. The J. E. Rumhell, 148 U. S. 1, wherein it was said: "According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a State, for repairs or supplies furnished to a vessel in her

Sec. 6. Liability for Supplies, etc.

As long as the mortgagor of a vessel is permitted by the mortgagee to retain possession thereof, he is liable for supplies and repairs to the vessel and for the discharge of those duties and obligations which are ordinarily due from the owner. The mortgagee is not so liable until he takes possession of the vessel, unless the supplies or repairs are furnished or made upon his credit or by a special contract with him.³⁷ The person named as vendee in a bill of sale of a vessel may, though the vessel is registered

home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re*, a right of property in the vessel existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only. The mortgage, on the other hand, is not a maritime contract, and constitutes no maritime lien, and the mortgagee can only share in the proceeds in the registry after all maritime liens have been satisfied."

37. Kimball *v.* Farmers' and Mechanics' Nat. Bank, 138 N. Y. 500; Hesketh *v.* Stevens, 7 Barb. 488; Thorn *v.* Hicks, 7 Cow. 697; Baxter *v.* Wallace, 1 Daly 303, 24 How. Pr. 484; Weber *v.* Sampson, 6 Duer 358;

Ring *v.* Franklin, 2 Hall 1; Birbeck *v.* Tucker, 2 Hall 121; McIntyre *v.* Scott, 8 Johns. 159; Champlin *v.* Butler, 18 Johns. 169; Delano *v.* Wright, 1 Rob. 298; Weston *v.* Wright, 1 Rob. 312; Morgan *v.* Shinn, 15 Wall. (U. S.) 105; Davidson *v.* Baldwin, 79 Fed. 95, 24 C. C. A. 453, 47 U. S. App. 589; The Canada, 7 Sawy. 173, 7 Fed. 248; Philips *v.* Ledley, 1 Wash. C. C. 226, Fed. Cas. No. 11,096.

Reason for Rule.—“A mortgagee of a ship, out of possession, is not liable for necessaries furnished the ship, for he does not take the freight.” McIntyre *v.* Scott, 8 Johns. 159.

Brokers.—A mortgagee of a vessel is not liable to brokers for obtaining a charter-party of the vessel, where the mortgagee is not in possession and it is not signed by him and there is no proof of agency of the person signing. Weber *v.* Sampson, 6 Duer 358.

Subsequent Possession.—A mortgagee of a vessel, out of possession at the time supplies for her are furnished, but who takes possession subsequently, is not liable for the supplies furnished before the commencement of his possession. Birbeck *v.* Tucker, 2 Hall 121.

in his name in the custom house, show by parol that the instrument is but a mortgage and that he is, therefore, not liable for supplies, repairs, etc.³⁸ But, if the mortgagee has taken possession of the vessel, he is liable for supplies furnished and repairs made, though his relation to the ship was unknown to the creditor at the time the claim arose.³⁹ The mortgagee is generally liable if the vessel is used for his own benefit.⁴⁰ Very slight acts of possession by the mortgagee will be considered as sufficient to establish his possession and subject him to liabilities as owner.⁴¹

Sec. 7. Right to Earnings of Vessel.

The right to the earnings of a vessel is generally vested in the person upon whom the liability for supplies and repairs is devolved. This, as stated in the preceding section, is the mortgagor if he has the possession of the vessel.⁴² Where the mortgagee has a right to take possession, the mortgagor's right to collect the freight moneys may be intercepted by the mortgagee's taking possession of the vessel at any time before the delivery of the cargo, in which event the latter becomes entitled to all the earnings of the voyage subject to such expenses as are legally chargeable thereon.⁴³ But he does not acquire the right to freights which have become payable and

38. *Baxter v. Wallace*, 1 Daly 303, 24 How. Pr. 484; *Weber v. Sampson*, 6 Duer 358; *Ring v. Franklin*, 2 Hall 1; *Birbeck v. Tucker*, 2 Hall 121; *Champlin v. Butler*, 18 Johns. 169; *Delano v. Wright*, 1 Rob. 298; *Weston v. Wright*, 1 Rob. 312; *Morgan v. Shinn*, 15 Wall. (U. S.) 105; *Davidson v. Baldwin*, 79 Fed. 95, 24 C. C. A. 453. 47 U. S. App. 589.

The registration of a vessel at the custom house, under a bill of sale, although accompanied by the oath of the person in whose name it is registered that he is the true and only owner, is not conclusive as to the ownership. *Baxter v. Wallace*, 1 Daly 303, 24 How. Pr. 484.

39. *Miln v. Spinola*, 4 Hill 177, aff'd, 6 Hill 218.

40. *Champlin v. Butler*, 18 Johns. 169. See also *Delano v. Wright*, 1 Rob. 298; *Weston v. Wright*, 1 Rob. 312.

41. *Stalker v. The Henry Kneeland*, Fed. Cas. No. 13,282.

42. *Kimball v. Farmers and Mechanics' Nat. Bank*, 138 N. Y. 500; *The Brig Wexford*, 7 Fed. 674; *Mechants' Banking Co. v. Cargo of Afton*, 134 Fed. 727, 67 C. C. A 618; *Philips v. Ledley*, 1 Wash. C. C. 226, Fed. Cas. No. 11,096.

43. *Kimball v. Farmers and Mechanics' Bank*, 33 St. Rep. 870, 11 N. Y. Supp. 730.

have been received by the mortgagor before possession is taken, although for the voyage then current.⁴⁴

Where a mortgagee of a vessel took possession thereof but permitted the owner to make certain trips under the agreement that the net freight was to be applied on his mortgage, and on such a trip the vessel got frozen in ice and a subsequent mortgagee paid liens against her and towed her back and received the freight money, it was held, in an action by the prior mortgagee to recover such moneys, that he was entitled to recover, in the absence of evidence that he abandoned the vessel and with knowledge of the situation refused to redeem her from the claims against her.⁴⁵

44. *Merchants' Banking Co. v. Cargo of Afton*, 134 Fed. 727, 67 C. C. A. 618.

Freight.—The owners and mortgagors of a ship who are allowed to remain in possession by the mortgagee are at liberty in the meantime to make contracts for her employment, but when the mortgagee takes possession, he takes the right to all the freight which is then accruing. If he

finds any cargo on board in respect to which the freight has accrued, and on which the mortgagor has a lien for the freight, the mortgagee succeeds to that lien, and can enforce it in a court of law. *Merchants' Banking Co. v. Cargo of Afton*, 134 Fed. 727, 67 C. C. A. 618.

45. *Kimball v. Farmers and Mechanics' Nat. Bank*, 138 N. Y. 500.

CHAPTER XV.

MORTGAGES IN BANKRUPTCY PROCEEDINGS.

SEC. 1. In General.

2. Execution of Mortgage as an Act of Bankruptcy.
3. Mortgage as Preference.
4. Fraudulent Mortgage.
5. Right of Trustee to Attack Mortgage.
6. Sale of Mortgaged Property.

Sec. 1. In General.

The validity of a chattel mortgage in bankruptcy proceedings is, as a general proposition, determined by the law of the State where the transaction occurred.¹ A trustee in bankruptcy takes the property of the bankrupt subject to all the rights, claims and equities that have been impressed upon it in the hands of the bankrupt, and the validity of such rights, claims and equities is to be determined, in the absence of federal statute, by the local law as evidenced by the decisions of the State courts.²

1. Etheridge *v.* Sperry, 139 U. S. 266, 11 Sup. Ct. R. 565, 35 L. ed. 171; *In re Wright*, 2 Am. B. R. 364, 96 Fed. 187; *In re Johnson*, 8 Am. B. R. 423, 111 Fed. 404; *In re Andrae Co.*, 9 Am. B. R. 135, 117 Fed. 561; Dodge *v.* Norlin, 13 Am. B. R. 177, 133 Fed. 363; *In re First Nat. Bank of Canton*, 14 Am. B. R. 180, 135 Fed. 62; Detroit Trust Co. *v.* Pontiac Savings Bank, 27 Am. B. R. 821; Rode & Horn *v.* Phipps, 27 Am. B. R. 827. See also Collier on Bankruptcy (9th ed.), pp. 933, 959.

In interpreting a recording statute of a State, the interpretation as adopted by the highest court of the State must be accepted by the bankruptcy court. Detroit Trust Company *v.* Pontiac Savings Bank, 27 Am. B. R. 821.

Recording Not Required. — The decision of the highest court of a State, that recording is not essential to the validity of a chattel mortgage executed therein, when the State law does not so require, must be followed by the bankruptcy court. *In re Johnson*, 8 Am. B. R. 423, 111 Fed. 404.

2. *In re Wade*, 26 Am. B. R. 169.

The trustee of a bankrupt takes possession of the bankrupt's property under section 70a as of the date of adjudication and takes it in the same plight and condition that the bankrupt himself held it on that date and subject to all the equities impressed on it in the hands of the bankrupt. *In re Hurley*, 26 Am. B. R. 434.

Upon the bankruptcy of a debtor, the trustee in bankruptcy takes his property for the benefit of general

The claims to which priorities are accorded are not, as a general proposition, entitled to payment out of the proceeds of property mortgaged by the bankrupt before satisfaction of the mortgage.³ But there is authority giving wages of workmen priority over chattel mortgages.⁴

Sec. 2. Execution of Mortgage as an Act of Bankruptcy.

Section 3 of the Bankruptcy Law prescribes the acts which constitute "Acts of Bankruptcy." So far as material to chattel mortgages, it provides: "Acts of Bankruptcy. — a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors."⁵

A chattel mortgage may, under this section, constitute an act of bankruptcy where its purpose is to defraud creditors or to create

creditors, subject to whatever liens thereon existed against the bankrupt. *Rode & Horn v. Phipps*, 27 Am. B. R. 827.

3. See Collier on Bankruptcy (9th ed.), p. 885.

4. *In re McDavid Lumber Co.*, 27 Am. B. R. 39.

5. A petition, charging as an act of bankruptcy the giving of a chattel mortgage within the four months period, must allege facts sufficient to show that the mortgage was given either with intent to hinder, delay and defraud creditors, or with intent to prefer the mortgagee over other creditors; it should also allege that there were other creditors and that the debt secured by the mortgage was pre-existing, or, if then incurred or made, that the mortgage was for an

inadequate consideration, as the case may be. *In re Flint Hill Stone & Construction Co.*, 18 Am. B. R. 81, 149 Fed. 1007.

No Act of Bankruptcy.—Where, within the four months period, the bankrupts, upon purchasing \$3,000 worth of goods, paid \$100 in cash and gave their notes for the balance, secured by a chattel mortgage, which in terms covered all additions to said stock, and all stocks that might thereafter be consolidated with it, and immediately after said purchase and the execution of said mortgage the stock covered thereby was in good faith consolidated with a stock of goods previously owned by the bankrupts, no act of bankruptcy was committed. *Martin v. Hulen & Co.*, 17 Am. B. R. 510, 149 Fed. 982.

a preference. Where the ground alleged is that the mortgage is fraudulent, proof that the mortgage was a preference will not establish an act of bankruptcy.⁶ To give a mortgage, while insolvent, to secure an honest debt incurred in his business, at the time the mortgage is given to carry on the business, or to secure an indorsement made at the time of giving a note which is for a present full consideration in carrying on his business, the mortgage being given at the same time, even if these acts are done within four months of filing the petition, is not necessarily an act of bankruptcy, as in such case there may not exist either an intent to hinder, delay, or defraud or to prefer one creditor over another.⁷

Sec. 3. Mortgage as Preference.

Section 60 of the Bankruptcy Act defines preferences and prescribes the circumstances under which they may be avoided by a trustee in bankruptcy. Such section, so far as it is material to transfers in the nature of a chattel mortgage, provides as follows:

“Preferred Creditors. — a. A person shall be deemed to have

6. *Githens, etc., Co. v. Shiffler Bros.,* 7 Am. B. R. 453, 112 Fed. 505.

A conveyance of property charged to have been made with intent to hinder, delay or defraud creditors, does not constitute an act of bankruptcy under section 3a, unless there was in fact an actual intention to defraud. *In re McLoon*, 20 Am. B. R. 719, 162 Fed. 575.

7. *In re Flint Hill Stone & Construction Co.*, 18 Am. B. R. 81, 149 Fed. 1007.

Within the four months period a bankrupt in good faith, supposing that she was solvent, mortgaged her property to secure her son, who was not a creditor, for the payment by him of her debt to a bank, and for the general purpose of securing him for advances which he should make to her creditors, she believing at the time that her estate was sufficient to

pay them in full. In pursuance of the intention of both parties her indebtedness was reduced between the date of the mortgage and the filing of the petition in bankruptcy, and no unsecured debts were incurred after the mortgage was given. The mortgage was not recorded at the time it was given, nor for some months later; but the bankrupt testified that she supposed it was recorded, and that she was surprised that it had not been. It was held that the facts did not show such a failure to record the mortgage as could be held to be part of a scheme to hinder, delay and defraud creditors; that the mortgage was given with intent, not to prefer a portion of her creditors, but to pay all of them, and therefore it did not constitute an act of bankruptcy under section 3a(1). *In re McLoon*, 20 Am. B. R. 719.

given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, procured or suffered a judgment to be entered against him in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

“ b. If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before adjudication, the bankrupt be insolvent, and the judgment or transfer operate as a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

“ c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind of property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.”⁸

8. See *Collier on Bankruptcy* (9th ed.), p. 784.

It is not every preference within four months of the filing of the petition in bankruptcy that can be avoided by the trustee in bankruptcy. It cannot be avoided unless the creditor receiving the same had reasonable cause to believe that it was intended as a preference.⁹ A creditor to whom a transfer is made has reasonable cause to believe a preference was intended if he has knowledge of facts and circumstances which would put a prudent man upon

9. Pittsburgh Plate Glass Co. *v.* Edwards, 17 Am. B. R. 447, 148 Fed. 377; Hussey *v.* Richardson-Roberts Dry Goods Co., 17 Am. B. R. 511, 148 Fed. 598; Coder *v.* Arts, 18 Am. B. R. 513; *In re* Tindal, 18 Am. B. R. 773, 155 Fed. 456; Rutland County Nat. Bank *v.* Graves, 19 Am. B. R. 446, 156 Fed. 168; Deland *v.* Miller & Cheney Bank, 26 Am. B. R. 744.

Question of Fact.—Section 60-b applies only where the creditor knows or has reasonable cause to believe the debtor insolvent, and this is a question of fact. Deland *v.* Miller & Cheney Bank, 26 Am. B. R. 744.

The transfer specified in *Bankruptcy Act, 1898*, sec. 60-a, includes a mortgage or a lien voluntarily created by the debtor. If such a mortgage or lien creates a preference under section 60a, it is nevertheless not voidable under section 60b unless the creditor who receives it, or is benefited thereby, had reasonable cause to believe that it was intended to give a preference by it. Coder *v.* Arts, 18 Am. B. R. 513.

Mortgage Held a Voidable Preference.—A debtor stated to his creditor on December 24, 1903, that his property was worth \$246,750, and that he owed only \$36,000. On May 2, 1904, he made a mortgage on a part of his property for \$98,503.32 to another creditor. On June 13, 1904, he made another statement to his

creditor that his property was worth \$254,740, and that he owed \$195,400, of which \$147,500 was secured by mortgages upon his real estate. Thereupon, the creditor, to secure its claim for \$22,000, took from him three mortgages which together covered substantially all the debtor's unexempt property except a few hogs and horses, including his tools, machinery and crops, and the debtor who was then insolvent, thereby gave a preference under section 60a of the *Bankruptcy Act, 1898*. It was held that the creditor had reasonable cause to believe when it took the mortgages that it was intended thereby to give a preference. Coder *v.* McPherson, 18 Am. B. R. 523, 152 Fed. 951.

Where a creditor for several months prior to receiving from a bankrupt a chattel mortgage, delivered within the four months period, had almost wholly ceased its sale to him, and was pressing for a full satisfaction of its account, and it appears that the creditor's attorney, with knowledge that the bankrupt's check, given to an agent of the creditor, had been dishonored, received a post-dated check from the bankrupt for the balance of his account, and a note for the same amount, secured by the chattel mortgage, which was not recorded until the day before the adjudication, when the bankrupt was

inquiry and if by such inquiry he could have ascertained the facts by which it would appear that the transfer was preferential.¹⁶

An instrument of transfer required by the State law to be recorded speaks at the time the requirement is complied with and not at the time of its execution, and a failure to record when required may entail a consequence which does not result from the State law alone. Thus, a transfer good as to the bankrupt and his general creditors while not of record, may nevertheless be voidable as to the trustee representing them if the instrument be of a class required to be recorded.¹⁷

hopelessly insolvent, the mortgage constitutes a voidable preference under section 60b. *Pittsburg Plate Glass Co. v. Edwards*, 17 Am. B. R. 447, 148 Fed. 377.

A partnership mortgage given within the four months period and while the partnership was insolvent, to secure the individual debt of a member of the firm, constitutes a voidable preference, upon the adjudication in bankruptcy of the partnership. *In re W. J. Floyd & Co.*, 19 Am. B. R. 438, 156 Fed. 206.

An assignment of a mortgage given within the four months period by an insolvent corporation constitutes a preference under section 60b, if the creditor receiving it has reasonable cause to believe, etc., though the mortgage was given in attempted ratification of a prior invalid and inoperative assignment of the mortgage by the secretary of the corporation. *In re Mills Co.*, 20 Am. B. R. 501, 162 Fed. 42.

Since the amendment of 1903 payments made by a bankrupt within the four months period are not recoverable as preferences, unless the proof shows that the bankrupt made them with intent to prefer and that the

creditor who received them had reasonable cause to believe that a preference was intended. *Rutland County Nat. Bank v. Graves*, 19 Am. B. R. 446, 156 Fed. 168.

10. *In re W. W. Mills Co.*, 20 Am. B. R. 501, 162 Fed. 42.

Notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would develop. *Coder v. McPherson*, 18 Am. B. R. 523.

11. *Mattley v. Giesler*, 26 Am. B. R. 116.

Held **Voidable Preference**.—Where a mortgagee of a mortgage given eight months before the bankruptcy of the mortgagor, withheld said mortgage from record pursuant to agreement until two days before said bankruptcy at which time the mortgagor was insolvent and the mortgagee had reasonable grounds for believing it, and the statute of the State (Nebraska) required such record in order to invalidate the mortgage as to creditors, subsequent purchasers and mortgagees in good faith, there was a preference in favor of said mortgagee, voidable at the instance of the trust-

Where a chattel mortgage given, within the four months period, to secure the purchase price of a present sale of goods, also covers other goods, it may be a prohibited preference as to such goods, but is valid as to the goods sold at the time the mortgage was given.¹²

The fair valuation of the bankrupt's property at the time of such payments should be considered in determining his insolvency and intent to prefer, and not what the property brought in a lump at an auction sale by the trustee.¹³

Sec. 4. Fraudulent Mortgage.

Section 67, subdivision e, of the Bankruptcy Act in reference to liens, provides: "That all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the

tee in bankruptcy, under section 60a, and this was so, even though the penalty for non-compliance with the State law was not invalidity as to everybody and for all purposes. *Mattley v. Giesler*, 26 Am. B. R. 116.

12. *In re Hull*, 8 Am. B. R. 302, 115 Fed. 858.

13. *Rutland Co. Nat. Bank v. Graves*, 19 Am. B. R. 446.

State, territory, or district in which such property is situate, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.”¹⁴

A transfer or mortgage made by a person adjudged a bankrupt, to secure a pre-existing debt, within four months of the filing of the petition, is not void under this subsection, unless it was either made with the intent on his part to hinder, delay, or defraud his creditors, or some of them, or is held void as against his creditors by the laws of the State, territory, or district in which the property is situated. A transfer made in good faith to pay or to secure an honest antecedent debt by an insolvent within four months of the filing of a petition in bankruptcy by or against him constitutes no evidence of an intent on his part to hinder, delay, or defraud other creditors, within the meaning of this subsection, notwithstanding the fact that its necessary effect is to hinder and delay them, and to deprive them of the opportunity they might otherwise have had to collect their claims in full.¹⁵

A mortgage will not be deemed fraudulent unless the mortgagee took the conveyance in bad faith, notwithstanding the fraud of the mortgagor.¹⁶ The knowledge of the mortgagee as to the fraudulent intent of the bankrupt in giving a chattel mortgage as derived

14. See Collier on Bankruptcy (9th ed.), p. 927.

15. *Coder v. Arts*, 18 Am. B. R. 513, 152 Fed. 943, *aff'd*, 22 Am. B. R. 1, 213 U. S. 223.

16. *In re Soudans Mfg. Co.*, 8 Am. B. R. 45, 113 Fed. 804.

Valid Mortgage. — Where a manufacturing corporation, while a going concern and actively engaged in its business, within four months of its bankruptcy, obtains a present loan of

money to pay off existing indebtedness, especially to meet advances made by another, and to increase its output, secures the loan by a chattel mortgage upon its plant, the mortgagee relying upon an investigation alone of the title and apparent value of the machinery and fixtures, and upon general statements on the part of the president of the corporation, but with no examination of the books of the corporation or other investi-

from knowledge of his financial condition is a question of fact and mere inability to pay debts does not invalidate the mortgage if a present valid consideration be given therefor by one who has no reason to know that a fraud will be thereby committed.¹⁷

Sec. 5. Right of Trustee to Attack Mortgage.

Under section 60 of the Bankruptcy Act, a trustee is expressly authorized to attack a mortgage operating as an unlawful preference,¹⁸ and under section 67 he is empowered to attack a fraudulent mortgage.¹⁹ The question whether a trustee may attack a mortgage not properly filed or refiled has occasioned some difficulty, the weight of authority, however, supports the view that he has such power under sections 67 and 70.²⁰ But further dis-

gation of its financial standing and ability, his mortgage is not invalid under the provisions of the Bankrupt Act, although the corporation at the time the mortgage was given was in fact insolvent. *In re Soudans Manufacturing Co.*, 8 Am. B. R. 45, 113 Fed. 804.

17. *In re Mahland*, 26 Am. B. R. 81.

Mortgage Held Valid.—A chattel mortgage for \$700, of which \$593 was upon a present consideration for cash, was given by a son to his father within four months prior to the filing of the son's petition in bankruptcy. It was held that its validity depended upon the actual intent of the parties, and that, in the absence of proof of fraud, by the trustee in bankruptcy of the son, the mortgage would be held valid for the amount actually advanced at the time of its execution, and, being valid under the State law, it would be valid under section 67e of the Bankruptcy Act, though made within four months of the filing of the petition. *In re Mahland*, 26 Am. B. R. 81.

18. See *supra*, the subdivision *Mortgage as Preference*, p. 202.

Insufficient Funds.—A chattel mortgage, given within the four months period, cannot be successfully assailed by the mortgagor's trustee in bankruptcy, without his showing that the funds in his hands are insufficient to satisfy the claims of creditors. *DeLand v. Miller & Cheney Bank*, 26 Am. B. R. 744.

19. See *supra*, the subdivision *Fraudulent Mortgage*, p. 206.

20. *In re Leigh*, 2 Am. B. R. 606; *In re Pekin Plow Co.*, 7 Am. B. R. 369, 112 Fed. 308; *In re Andrae Co.*, 9 Am. B. R. 135, 117 Fed. 561; *In re Luken*, 14 Am. B. R. 683, 133 Fed. 188; *In re Furniture Co.*, 15 Am. B. R. 119; *Skilton v. Codington*, 15 Am. B. R. 810, 185 N. Y. 80; *Titusville Iron Co. v. City of New York*, 207 N. Y. 203; *In re Hickerson*, 20 Am. B. R. 682, 162 Fed. 345; *Matter of McDonald*, 23 Am. B. R. 51, 173 Fed. 99. *Contra*, *In re New York Economical Printing Co.*, 6 Am. B. R. 615, 110 Fed. 514. See also *supra*, the subdivision *Trustee or Receiver in Bankruptcy*, p. 87.

pute on the question must be deemed foreclosed by the 1910 amendment to section 47 of the Bankruptcy Act, which provides: "And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."²¹

Sec. 6. Sale of Mortgaged Property.

Property encumbered by a chattel mortgage may be sold in bankruptcy proceedings free of encumbrances, and such a sale may be approved by the referee or judge.²² Where the property is so sold, the mortgagee is entitled to have sufficient of the proceeds of sale to pay the mortgage debt and interest, and cannot be required to pay any part of the costs of the administration of the estate.²³ But in some cases, where the trustee follows the property to another State and incurs expense in recovering and

Where a corporation purchases property subject to chattel mortgages thereon, its trustee cannot attack their validity because they were not filed as required by statute. *In re Columbia Fireproof Door and Trim. Co.*, 21 Am. B. R. 714, 168 Fed. 159.

21. *In re Hammond*, 26 Am. B. R. 336.

Amendment of 1910.—Sections 70 and 47a of the Bankruptcy Act should be construed together and, since the amendment to the latter section, the trustee no longer has merely limited title of the bankrupt. The amendment of 1910 to section 47a collectively puts the creditors of a bankrupt in the position of judgment or at-

tachment creditors by representation and enables the trustee to avoid the lien of a chattel mortgage given, prior to the amendment by the bankrupt on merchandise retained by him under circumstances which made such mortgage void as to creditors. *In re Clarence S. Hammond*, 26 Am. B. R. 336.

22. *In re Sanborn*, 3 Am. B. R. 54, 96 Fed. 507. See Collier on Bankruptcy (9th ed.), p. 1033.

23. *Mills v. Virginia-Carolina Lumber Co.*, 20 Am. B. R. 750, 164 Fed. 168; *Coder v. Arts*, 18 Am. B. R. 513. See Collier on Bankruptcy (9th ed.), p. 1033.

selling the same and in bringing back the proceeds, such expenses should be deducted from the proceeds.²⁴

The property may, however, be sold subject to the mortgage and the purchaser take the property charged therewith.²⁵

24. Matter of Hicks, 27 Am. B. R. 112 Fed. 957. See also Collier on Bankruptcy (9th ed.), p. 1033.

25. *In re Gerry*, 7 Am. B. R. 459,

PART II

CONDITIONAL SALES

CHAPTER XVI.

THE CONTRACT IN GENERAL.

SEC. 1. Nature of Conditional Sale.
2. Interest of Conditional Vendor.
3. Interest of Conditional Vendee.
4. Conditional Sale Distinguished from Chattel Mortgage.
5. Contract of Sale and Return.
6. Forfeiture on Default by Vendee.
7. Possession of Property.
8. Verbal Contract of Conditional Sale.
9. Alteration of Contract.
10. Fraudulent Contract.
11. Common-law Doctrine of Conditional Sales.
 a. In General.
 b. Property to Be Annexed to Realty.

Sec. 1. Nature of Conditional Sale.

This and the following chapters treat of "Conditional Sales." The term "conditional sale" is elastic. A chattel mortgage is one kind of a "conditional sale."¹ The common form of conditional sale is a sale upon the condition that the title to the property shall not pass to the purchaser until the payment of the purchase price. But there is no legal reason why sales may not be conditioned upon many other contingencies. A contract in the

1. See *supra*, the subdivision Definitions, p. 2.

form of a lease of property containing an option to the lessee to purchase the property for the total amount of all rental dues is a conditional sale.²

The term "conditional vendor" as used in article IV. of the Personal Property Law relating to contracts of conditional sales means the person contracting to sell goods and chattels upon condition that the ownership thereof is to remain in such person, until such goods and chattels are fully paid for or until the occurrence of any future event or contingency; and the term "conditional vendee," when so used, means the person to whom such goods and chattels are so sold.³

Sec. 2. Interest of Conditional Vendor.

Where property is sold on the condition that the title thereto shall not vest in the vendee until payment of the purchase price, until such payment, the legal title to the property remains in the vendor.⁴ The vendor, strictly speaking, has no lien upon the property, for a person cannot have a lien upon his own property.⁵ But as a practical proposition, the statutes relating to the filing of and sale under conditional sales have reduced the interest of the vendor to a lien similar to that created by a chattel mortgage.⁶

Upon an assignment of the contract by the vendor the assignee becomes the legal owner of the property and the act of an officer levying thereon under process against the vendee constitutes a conversion as against such assignee.⁷

2. *Gardner v. Town of Cameron*, 155 App. Div. 750, 140 N. Y. Supp. 634, *aff'd*, 215 N. Y. 682; *Bramhall, Deane Co. v. McDonald*, 172 App. Div. 780, 158 N. Y. Supp. 736; *Weiss v. Leichter*, 113 N. Y. Supp. 999.

3. Personal Property Law, § 60.

4. *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, *aff'd*, 191 N. Y. 387.

5. *Earle v. Robinson*, 91 Hun 363, 36 N. Y. Supp. 178, *aff'd*, 157 N. Y. 683, *mem.*; *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702; *Ohl &*

Co. v. Standard Steel Sections, 179 App. Div. 637, 167 N. Y. Supp. 184.

The conditional vendor is still the owner of the property, though the vendee has attempted to sell it to a third person; the conditional vendor has no lien upon the property, for a person cannot have a lien upon his own property. *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702.

6. *Scherl v. Flam*, 129 App. Div. 561, 114 N. Y. Supp. 86.

7. *Picone v. Freeman*, 115 N. Y. Supp. 128.

Sec. 3. Interest of Conditional Vendee.

A conditional vendee, before payment, has only an equitable interest in the property.⁸ This equitable interest is vendible, but not leviable; that is, it may be sold, or mortgaged by the vendee,⁹ but is not subject to an execution or attachment against him.¹⁰ But there is authority to the effect that where the vendee has paid a portion of the purchase price and is entitled to the possession of the property, he has an interest therein which is subject to levy.¹¹

8. *Friedman v. Phillips*, 84 App. Div. 179, 82 N. Y. Supp. 96.

9. *Friedman v. Phillips*, 84 App. Div. 179; *Washington Trust Co. v. Morse Iron Works and Dry Dock Co.*, 106 App. Div. 195, 94 N. Y. Supp. 495, *mod.*, 187 N. Y. 307; *Levy v. Horn*, 90 Misc. 624, 153 N. Y. Supp. 913.

No title to the property vests in the conditional vendee; the title remains in the vendor until full payment and the right to retake the property becomes fixed upon default by the vendee. *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, *aff'd*, 191 N. Y. 387.

10. *Herring v. Hoppock*, 15 N. Y. 409; *Cole v. Mann*, 62 N. Y. 1; *Empire St. Type Foundry Co. v. Grant*, 114 N. Y. 40; *National Cash Register Co. v. Coleman*, 85 Hun 125, 32 N. Y. Supp. 593; *Fennikoh v. Gunn*, 59 App. Div. 132, 69 N. Y. Supp. 12; *Friedman v. Phillips*, 84 App. Div. 179, 82 N. Y. Supp. 96; *Bowen v. Dawley*, 116 App. Div. 568, 101 N. Y. Supp. 878; *Picone v. Freeman*, 115 N. Y. Supp. 128; *Piser v. Stearns*, 1 Hilt. 86.

Authority in Vendee to Sell. — The fact that a consignee receiving property under a conditional sale is a dealer in property of the kind, and has authority to sell, provided he remits the proceeds, or to make a similar conditional sale recognizing

the title of the consignor, does not operate to pass the title to the former, and, while it may have an important bearing upon the rights of a *bona fide* purchaser from the consignee without notice of the limitation upon the authority of the latter, it does not affect the question of title as between him or his creditors and the consignor. *Cole v. Mann*, 62 N. Y. 1.

The vendee takes at most only a right by implication to the use of the chattel until default in the stipulated payments. *Herring v. Hoppock*, 15 N. Y. 409; *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702.

The recovery by the vendor of a judgment for the unpaid portion of the purchase price due on the property, after taking possession thereof, so long as it remains unsatisfied, does not affect the vendor's title to the property. *Nat. Cash Register Co. v. Coleman*, 85 Hun 125, 32 N. Y. Supp. 593.

11. *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705; *Savall v. Wauful*, 21 Civ. Pro. R. 18, 16 N. Y. Supp. 219.

A judgment creditor of a conditional vendee, who has a right to the possession of the property until default in payment, and who has paid a part of the purchase money, may

Under section 65 of the Personal Property Law he has a right of redemption for thirty days after the vendor retakes the property. This right is assignable.¹²

Upon payment of the purchase price, or performance of the condition precedent, the entire title passes to the vendee. The vendor may waive the performance of the condition precedent and title will vest in the vendee accordingly.¹³

Sec. 4. Conditional Sale Distinguished from Chattel Mortgage.

In another place in this work the distinction between a contract of conditional sale and a chattel mortgage is discussed.¹⁴

Sec. 5. Contract of Sale and Return.

A contract of "sale or return" is an agreement for the sale of goods pursuant to the arrangement that the vendee, under prescribed circumstances, may return the goods and avoid the sale, the sale to be absolute if the goods are not so returned. If no time is fixed by the contract within which the goods may be returned, they may be so returned within a reasonable time.¹⁵ If the right of return is not seasonably exercised, the sale becomes absolute.¹⁶ The transaction is a conditional sale in the sense that it is a sale with a condition annexed, but the condition is not such as to make the contract a "conditional sale" within the

levy upon the property. If the interest of the vendee is sold, the purchaser takes his place, and, upon paying the vendor the full purchase price unpaid, becomes the absolute owner. *Savall v. Wauful*, 21 Civ. Pro. Rep. 18, 16 N. Y. Supp. 219.

12. *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856.

13. The question whether a vendor has waived a condition upon the performance of which the title is to vest in the vendee, is usually a question of fact depending upon the in-

tention of the parties and all the circumstances attending the contract of sale and delivery. *Potter Printing Press Co. v. Schreiner*, 47 App. Div. 530, 62 N. Y. Supp. 492.

14. See *supra*, the subdivision *Conditional Sale*, p. 11.

15. *Greacen v. Poehlman*, 191 N. Y. 493; *Shaforman v. Loman*, 32 Misc. 726, 66 N. Y. Supp. 380.

16. *Costello v. Herbst*, 18 Misc. 176, 41 N. Y. Supp. 574; *Shaforman v. Loman*, 32 Misc. 726, 66 N. Y. Supp. 380.

meaning of the term as used in article IV. of the Personal Property Law.¹⁷

Sec. 6. Forfeiture or Default by Vendee.

Upon the default of the vendee the absolute title to the property reverts in the vendor subject to the rights accorded to the vendee by statute.¹⁸ The vendor may, however, waive the forfeiture. Thus, where he accepts after default an installment of the purchase price, he waives the forfeiture and cannot again insist upon the same until a demand for the sum due and a refusal of payment thereof.¹⁹ But an offer by the vendor, after default, to return a portion of the property which has been sent to him for repair, if the vendee will pay the amount in default and also a sum not yet due, which is refused, does not constitute a waiver of the default.²⁰

Sec. 7. Possession of Property.

The right to the possession of personal property is, as a general proposition, in the person holding the legal title. This, in the case of a contract of conditional sale, is the vendor.²¹ But the contract generally contains some clause, which, at least by implication, gives the vendee the possession of the property until

17. See *Keller v. Straus*, 35 Misc. 35, 70 N. Y. Supp. 126.

18. See **Personal Property Law**, § 65.

No title to the property vests in the conditional vendee; the title remains in the vendors until full payment, and the right to retake the property becomes fixed upon default by the vendee. *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, *aff'd*, 191 N. Y. 387.

19. *Hutchings v. Munger*, 41 N. Y. 155; *French v. Row*, 77 Hun 380; *Cunningham v. Hedge*, 12 App. Div. 212, 42 N. Y. Supp. 549.

Waiver. — Where an executory con-

tract for the sale of chattels provides that the purchase price shall be paid in installments, and that title shall not pass until the price is fully paid, and the vendor permits the vendee to retain possession and make other payments, after the whole contract price is due, he may not seize the property and terminate the contract for non-payment until he has demanded payment. *O'Rourke v. Hadcock*, 114 N. Y. 541.

20. *Equitable General Providing Co. v. Stein*, 16 Misc. 582, 38 N. Y. Supp. 774.

21. *Ideal Cash Register v. Zunino*, 39 Misc. 311, 79 N. Y. Supp. 504.

he defaults in payment.²² After default the vendor is entitled to possession until the vendee redeems, as permitted by section 65 of the Personal Property Law.²³

Sec. 8. Verbal Contract of Conditional Sale.

As between the parties an oral contract of conditional sale is valid if the usual practice of delivering the property to the vendee is followed. If, however, the property is of the value of \$50 or more and no part of the goods is delivered to the vendee, the contract is affected by the Statute of Frauds.²⁴ The vendee can recover under section 65 of the Personal Property Law the amount paid on the property where the vendor has not sold the property as required by the statute.²⁵ As an oral contract of conditional sale cannot be filed, the condition therein is ineffectual as against subsequent purchasers, pledgees and mortgagees in good faith, but where such persons have actual knowledge of the verbal reservation of title, they cannot secure rights superior to the vendor.²⁶ Before the enactment of the statute requiring the filing of contracts of conditional sale, such contracts, though verbal, were enforceable against subsequent purchasers in good faith.²⁷

Sec. 9. Alteration of Contract.

An immaterial alteration of a contract of conditional sale does not affect the rights of the parties, *inter se*. Thus, where a

22. See *Herring v. Hoppock*, 15 N. Y. 409; *People v. Gluck*, 188 N. Y. 167; *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705; *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702; *Savall v. Wauful*, 21 Civ. Pro. R. 18, 16 N. Y. Supp. 219.

23. *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856; *Powers v. Burdick*, 126 App. Div. 179, 110 N. Y. Supp. 883.

24. As between the vendor and vendee, a contract for the conditional

sale of goods need not be in writing, and the vendee under such a contract is entitled to the protection of the provisions of the Personal Property Law, so far as they can apply to an oral contract. *Alexander v. Kellner*, 131 App. Div. 809, 116 N. Y. Supp. 98.

25. *Alexander v. Kellner*, 131 App. Div. 809, 116 N. Y. Supp. 98.

26. *Tompkins v. Fonda Glove Lining Co.*, 188 N. Y. 261.

27. *McEntee v. Scott*, 2 T. & C. 284.

machine sold under a conditional contract was not satisfactory and it was exchanged for another, and the number of the latter machine was inserted in the contract in place of the former number, it was held that the alteration was not material and the contract, notwithstanding the erasure, controlled the agreement between the parties.²⁸ But a guarantor of the performance of a contract of conditional sale is discharged by an alteration of the contract, whether material or not, or whether the alteration is to his injury.²⁹

Sec. 10. Fraudulent Contract.

Rules and authorities in the chapter on fraudulent mortgages, in many instances, are applicable to contracts of conditional sale.³⁰ A contract of conditional sale which states that, whereas the first party is a baker without money to purchase flour and is anxious to have the second party assist him so that he may bake and make a living, the second party agrees to deliver flour from time to time as may be needed by the first party, the title to remain in the vendor until the price is paid, and that should the baker "desire" to use any of the flour in his business, he shall notify the vendor and shall immediately at his earliest convenience pay for the flour intended to be used, and thereupon the title thereto shall pass to the first party, is fraudulent upon its face.³¹

Sec. 11. Common-law Doctrine of Conditional Sales.

a. *In General.* — Before the enactment of statutes relative to contracts of conditional sale, it was the rule that the reservation of title in the vendor was valid and enforceable, even against subsequent purchasers from the vendee for value and without notice of the condition.³² To this rule there was at least one

28. *Domestic Sewing Machine Co. v. Barry*, 21 N. Y. Supp. 970, 51 St. Rep. 219.

29. *Weiss v. Leichter*, 113 N. Y. Supp. 999.

30. See *supra*, p. 106.

31. *Sherl v. Flam*, 129 App. Div. 561, 114 N. Y. Supp. 86.

32. *Ballard v. Burgett*, 40 N. Y. 314; *Austin v. Dye*, 46 N. Y. 500; *Boon v. Moss*, 70 N. Y. 465; *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp.

important exception which is not affected by the statutory provisions now in force. Where the conditional vendor delivers the property to the vendee for consumption, or for sale, or in a manner inconsistent with the continued ownership of the vendor, he is estopped from subsequently claiming title to the property as against a *bona fide* purchaser thereof from the vendee.³³ Thus, where wagons were sold, not for the use of the vendee, but that he might resell and deliver the same and receive the price thereof, it was held that the title of a subsequent purchaser, who had no knowledge of a secret agreement that the title to the wagons should remain in the original vendor until payment therefor by the original vendee, was not affected thereby.³⁴ And where a quantity of liquors was purchased for the stocking of a grocery, and the purchaser gave a receipt therefor specifying that the same were to remain the property of the seller until paid for, the liquors to be paid for when sold or returned when called for,

705; *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930; *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702; *Ryan v. Wollowitz*, 25 Misc. 498, 54 N. Y. Supp. 988; *Kenney v. Planer*, 3 Daly 131; *Piser v. Stearns*, 1 Hilt. 86; *Bohde v. Farley*, 19 J. & S. 42; *Herring v. Willard*, 2 Sandf. 418. *Contra*, *Wait v. Green*, 36 N. Y. 556.

Prior to the enactment of the Lien Law or Personal Property Law, it was the law that when a chattel is delivered to one who has bargained for the purchase thereof and agreed to pay therefor at a future day under an express contract that no title is to vest in him until payment, the property of the vendor is not divested and the purchaser takes at most only a right by implication to the use of the chattel until default in the stipulated payment. *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702.

33. *Fitzgerald v. Fuller*, 19 Hun 180; *Ludden v. Hazen*, 31 Barb. 650; *Albert v. Steiner Mfg. Co.*, 42 Misc. 522, 86 N. Y. Supp. 162.

The fact that a consignee receiving property under conditional sale is a dealer in property of the kind, and has authority to sell, provided he remits the proceeds, or to make a similar conditional sale recognizing the title of the consignor, does not operate to pass the title to the former, and while it may have an important bearing upon the rights of a *bona fide* purchaser from the consignee without notice of the limitation upon the authority of the latter, it does not affect the question of title as between him or his creditors and the consignor. *Cole v. Mann*, 62 N. Y. 1. *Compare Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705.

34. *Fitzgerald v. Fuller*, 19 Hun 180.

it was held the title to the property vested in the purchaser, and became liable for his debts.³⁵

b. *Property to Be Annexed to Realty.*—Where property is sold under a contract whereby the title is to remain in the vendor until payment of the purchase price, the transaction evinces an intention of the parties that the property shall remain personalty and not become a part of the realty to which it is annexed. The property being personalty, will not generally pass to a subsequent purchaser or mortgagee of the real estate.³⁶ But while the conditional vendor and vendee, as between themselves, can preserve the character of the goods affixed as personalty, they cannot do this as against a *bona fide* purchaser or mortgagee who does not assent to or have any knowledge of such arrangement.³⁷ Where the property is sold with full knowledge of the vendor that it is to be placed in a building in such a manner as to become part of the realty, a *bona fide* purchaser of the realty for value, without notice, obtains a good title as against the conditional vendor.³⁸

35. *Ludden v. Hazen*, 31 Barb. 650.

36. *Voorhees v. McGinnis*, 48 N. Y. 278; *Tifft v. Horton*, 53 N. Y. 377; *Davis v. Bliss*, 187 N. Y. 77; *Kerby v. Clapp*, 15 App. Div. 37, 44 N. Y. Supp. 116; *Duntz v. Granger Brewing Co.*, 41 Misc. 177, 83 N. Y. Supp. 957, *aff'd*, 96 App. Div. 631, *mem.*, *aff'd*, 184 N. Y. 595; *Sayles v. Nat. Water, etc., Co.*, 16 N. Y. Supp. 555; *Godard v. Gould*, 14 Barb. 662.

37. *Foreclosure of Mortgage.*—Where property purchased under a conditional sale is annexed to the realty, in a suit for the foreclosure of a mortgage upon the realty, the conditional vendor is not a necessary party. *Washington Trust Co. v. Morse Iron Works*, 187 N. Y. 307.

38. *Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17; *Otis Elevator Co. v. Rochester Friendly Home*, 103 Misc. 76, 169 N. Y. Supp. 389.

38. *Andrews v. Powers*, 66 App. Div. 216, 72 N. Y. Supp. 597; *Jermyn v. Hunter*, 93 App. Div. 175, 87 N. Y. Supp. 546; *McMillan v. Leaman*, 101 App. Div. 436, 91 N. Y. Supp. 1055; *Milicie v. Pearson*, 110 App. Div. 770, 97 N. Y. Supp. 431; *Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17, *aff'd*, 193 N. Y. 622; *Fitzgibbons Boiler Co. v. Manhasset Realty Co.*, 125 App. Div. 764, 110 N. Y. Supp. 225, *rev'd*, 198 N. Y. 517; *Jacobs v. Feinstein*, 133 App. Div. 416; *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 160 App. Div. 373, 145 N. Y. Supp. 477; *Jermyn v. Schweppenhauser*, 33 Misc. 603, 68 N. Y. Supp. 153. But see *Kerby v. Clapp*, 15 App. Div. 37, 44 N. Y. Supp. 116.

39. *Knowledge of Vendor.*—In the absence of statute, the conditional vendee can pass to third persons no better title than he himself possessed,

unless the vendor is estopped from asserting his title, as where he sold the goods with the understanding that the conditional vendee intended to affix the property to a building of another party; but where the vendor has no knowledge that the goods were to be so disposed of, he can recover the same from the owner of the premises. *Jermyn v. Schweppenhauser*, 33 Misc. 603, 68 N. Y. Supp. 153.

Effect of Vendor Filing Mechanics' Lien.—Where a conditional vendor of a heating plant to be installed in the vendee's building, after the installation and sale of the premises by the vendee, files a mechanics' lien against the interest of the vendee in the premises for the amount unpaid on the heating plant, he will not be entitled to recover the property under the conditional contract, as the assertion of a mechanic's lien is inconsistent with an assertion of ownership of the property. *Kirk v. Crystal*, 118 App. Div. 32, 103 N. Y. Supp. 17.

Mortgage on Premises.—Where without the knowledge of the owner of a tenement house under process of construction, a person furnished the contractor with ranges for heating and cooking purposes, under a contract of conditional sale, they became fixtures when annexed to the realty by the contractor, and are covered by the lien of a prior mortgage given by the owner, although the contractor failed to pay the purchase price. The lien of a mortgage covers all that was realty when the mortgage was accepted as security, and all accessions to the realty except where by valid agreement to which the mortgagee is a party, the character of chattels is impressed upon accessions. *Mechanics and Traders' Bank v. Bergen Heights Realty Corp.*, 137 App. Div. 45, 122 N. Y. Supp. 33. See also *Washington*

Trust Co. v. Morse Iron Works and Dry Dock Co., 106 App. Div. 195, 94 N. Y. Supp. 495, *mod.*, 187 N. Y. 307.

Annexed to Municipal Building.—A materialman who has furnished boilers to a subcontractor who has installed them in a substantial manner in buildings erected for the City of New York, cannot recover possession of the boilers as against the city, nor the balance of the purchase price owed by the subcontractor, merely because they were sold to the subcontractor under a contract of conditional sale, if the city, through proper officers, had no knowledge whatever of the fact that the sale was conditional until long after the boilers were installed and it had made substantial payments for them to the general contractor. *Fitzgibbons Boiler Co. v. City of New York*, 173 App. Div. 463, 159 N. Y. Supp. 357.

Complaint; parties defendant.—A demurrer will lie to a complaint in an action to recover an elevator and appurtenances substantially installed in a building by a vendee under a conditional sales contract reserving title in the vendor until the contract price is fully paid, where it does not appear from the allegations in the complaint that notice, actual or constructive, had been given to the owner of the reservation of the property as personality prior to the installation. A demurrer will also lie to such a complaint on the ground of a defect of parties defendant where the vendee is not made a party, since the determination of the action without his presence will subject the owner to a double hazard of recovery and his presence is necessary to a complete determination of the rights of the parties under the contract. *Otis Elevator Co. v. Rochester Friendly Home*, 103 Misc. 76, 169 N. Y. Supp. 389.

CHAPTER XVII.

FILING, REFILING AND DISCHARGE FROM RECORD.

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Sec. 1. Statute.

Section 62 of the Personal Property Law provides for the filing of contracts of conditional sales as follows: "Except as otherwise provided in this article, all conditions and reservations in a contract for the conditional sale of goods and chattels, accompanied by delivery of the thing contracted to be sold, to the effect that the ownership of such goods and chattels is to remain in the conditional vendor or in a person other than the conditional vendee, until they are paid for, or until the occurrence of a future event or contingency, shall be void as against subsequent purchasers, pledgees or mortgagees, in good faith, and as to them the sale shall be deemed absolute, unless such contract of sale, containing such conditions and reservations, or a true copy thereof, be filed as directed in this article, and unless the other provisions of the lien law applicable to such contracts are duly complied with.

Every such contract for the conditional sale of any goods and chattels attached, or to be attached, to a building, shall be void as against subsequent *bona fide* purchasers or incumbancers of the premises on which said building stands, and as to them the sale shall be deemed absolute, unless, on or before the date of the delivery of such goods or chattels at such building, such contract shall have been duly and properly filed and indexed as directed in this article, and unless said contract shall contain a brief description, sufficient for identification, of the premises which said building occupies, or upon which said building stands, and if in a city or village its location by street number, if known, and if in a city or county where the block system of recording and indexing conveyances is in use, the section and block within which it is located."

Sec. 2. Purpose and Construction of Statute.

The purpose of the statute is to give some protection against loss or injury to persons buying personal property from those who have all the outward *indicia* of ownership by possession and use of it.¹

The statute being one that changes the common law, is to be held to abrogate it only so far as the clear import of the language absolutely requires.² It contemplates the making and filing of an agreement for each sale and not an omnibus agreement in advance for future sales.³ The filing must take place on or before the delivery of the property to be an effectual notice.^{3a} It must be done within a reasonable time, and a delay from February 1st to March 23rd will render the contract ineffective as against a subsequent mortgagee in good faith.^{3b}

Sec. 3. Necessity of Filing.

a. *In General.*— The statute requires the filing of a contract of conditional sale to render the condition operative as against

1. *Campbell Printing Press, etc., Co. v. Oltrogge*, 13 Daly 247; *Otis Elevator Co. v. Rochester Friendly Home*, 103 Misc. 76, 169 N. Y. Supp. 389.

"The reason for the enactment of the law providing for the filing of contracts for conditional sales was to protect those purchasing in good faith articles from those apparently having the title to the same as evidenced by their possession." *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930.

2. *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930; *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 160 App. Div. 373, 145 N. Y. Supp. 477.

3. *Scherl v. Flam*, 129 App. Div. 561, 114 N. Y. Supp. 86.

3a. *Otis Elevator Co. v. Rochester Friendly Home*, 103 Misc. 76, 169 N. Y. Supp. 389.

3b. *Seger & Gross Co. v. Maclaire*, 165 N. Y. Supp. 423.

purchasers, pledgees, or mortgagees in good faith.⁴ In some cases, even before the enactment of the statute, such conditions were not enforceable.⁵ The necessity for filing is not avoided by making the contract in the form of a lease.⁶ But the statute applies only when the thing directed to be sold is delivered to the purchaser.^{6a} Where the agreement is made in New York State, but by the terms thereof the property is to be delivered to the vendee in New Jersey, and is there to be kept and paid for, the transaction is governed by the law of New Jersey and the New York statute requiring filing is not applicable.⁷

For a period prior to 1905 contracts of conditional sales of certain property were not required to be filed where they had been executed in duplicate and one copy retained by the vendee.⁸

b. *Contract for Goods to be Subsequently Delivered.*—The statute, before the amendment in 1904, was construed as inapplicable to a contract where the goods were to be manufactured or delivered long after the execution of the contract.⁹ The amend-

4. See *Gerber v. Mandel*, 56 N. Y. Supp. 1030.

5. See *supra*, the subdivision *Common-law Doctrine of Conditional Sales*, p. 217.

6. *Campbell Printing Press, etc., Co. v. Oltrogge*, 13 Daly 247. But if the contract is actually a lease, and not a conditional sale, the statute does not require its filing. *Cutler Mail Chute Co. v. Crawford*, 167 App. Div. 246, 152 N. Y. Supp. 750.

6a. *Flynn v. Badger*, 173 App. Div. 71, 158 N. Y. Supp. 859.

7. *Fiske v. Peebles*, 13 St. Rep. 743

8. See *Kerby v. Clapp*, 15 App. Div. 37, 44 N. Y. Supp. 116; *Grant v. Griffith*, 39 App. Div. 107, 56 N. Y. Supp. 791, *aff'd*, 165 N. Y. 636, *mem.*; *Baldinger v. Levine*, 83 App. Div. 130, 82 N. Y. Supp. 483; *Vincinguerra v. Fagan*, 57 Misc. 224.

The repeal of former section 115 of the *Lien Law*, which exempted certain conditional contract sales from the necessity of filing where a duplicate copy of the contract was delivered to the purchaser, rendered it

necessary to file existing contracts for the conditional sale of such chattels; and the failure to file such contracts rendered them void as against subsequent mortgagees in good faith. *Vincinguerra v. Fagan*, 57 Misc. 224, 109 N. Y. Supp. 317.

9. *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 42 N. Y. Supp. 930; *Hirsch v. Graves Elev. Co.*, 24 Misc. 472, 53 N. Y. Supp. 664; *Duntz v. Granger Brewing Co.*, 41 Misc. 177, 83 N. Y. Supp. 957, *aff'd*, 96 App. Div. 631, *mem.*; *aff'd*, 184 N. Y. 595, *mem.*

The statute requiring the filing of conditional contracts of sale does not refer to a case where the thing sold is to be delivered long after the execution of the contract, nor to a case where the articles are to be manufactured, and where the contract contemplates after delivery and future vesting of actual possession. Neither will the subsequent delivery of the property to the vendee relate back to the time of the execution of the contract and render such contract void.

ment of 1904 changed the previous rule and rendered necessary the filing of such contracts as against the persons named in the statute.¹⁰

Sec. 4. Place of Filing.

Section 63 of the Personal Property Law regulates the place for the filing of contracts of conditional sales. It provides as follows: "Such contracts except contracts for the conditional sale of goods and chattels supplied for a building and attached or to be attached thereto, shall be filed in the city or town where the conditional vendee resides, if he resides within the state at the time of the execution thereof, and if not, in the city or town where such property is at such time. Such contract shall be filed in the city of New York, as follows, namely: in the borough of Brooklyn in said city, such instrument shall be filed in the office of the register of the county of Kings; in the borough of Queens in said city, in the office of the clerk of Queens county; in the borough of Richmond in said city, in the office of the clerk of the county of Richmond; in the borough of Manhattan in said city, in the office of the register of the county of New York, and in the borough of the Bronx in said city, in the office of the register of the county of Bronx; in every other city or town of the state,

from the beginning. *Graves Elevator Co. v. Callanan*, 11 App. Div. 301, 12 N. Y. Supp. 930.

Where an order for an engine and boiler taken by an agent requires that the order be submitted to the vendor for approval, the fact that the goods are not delivered until two or three weeks after the order was given, does not establish that there was no "immediate delivery" of the goods within the meaning of the statute relating to conditional sales. Such a conditional sale must be filed as against a subsequent mortgage in good faith. *Grant v. Griffith*, 39 App. Div. 107, 56 N. Y. Supp. 791, *aff'd*, 165 N. Y. 636, *mem.*

10. *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 140 App. Div. 726, 125

N. Y. Supp. 721; *Breakstone v. Buffalo Foundry & Machine Co.*, 167 App. Div. 62, 152 N. Y. Supp. 394; *McLean v. Bloch*, 52 Misc. 545, 102 N. Y. Supp. 838.

Goods to be Manufactured.—The failure to file, on or before the date of the delivery of chattels to be affixed to the realty, the contract for the conditional sale thereof, renders the sale absolute as to *bona fide* purchasers or incumbrancers, though the chattels at the time the contract was made were not in existence, but were to be manufactured and delivered in the future. *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 140 App. Div. 726, 125 N. Y. Supp. 721; *Seger & Gross Co. v. Maclaire*, 166 N. Y. Supp. 423.

in the office of the city or town clerk, unless there is a county clerk's office in such city or town, in which case it shall be filed in such office. But all such contracts for the conditional sale of goods and chattels, attached or to be attached to a building, shall be filed with the register of the city or county or with the county clerk of the county, in case there is no register of such county, in which the premises whereon the said building stands are located."

Sec. 5. Indorsement, Entry, Refiling and Discharge.

A single section of the Personal Property Law provides for the indorsement, entry, refiling and discharge of contracts for the conditional sale of goods and chattels.¹¹ It is as follows: "The provisions of article ten of the lien law relating to chattel mortgages apply to the indorsement, entry, refiling and discharge of contracts for the conditional sale of goods and chattels, except contracts for the conditional sale of goods and chattels, attached or to be attached to a building. The officers with whom such first-mentioned contracts are filed shall enter the future contingency or event required to occur before the ownership of said goods and chattels shall pass from the vendor to the vendee, the amount due upon such contract and the time when due. The name of the conditional vendor shall be entered in the column of 'mortgagees,' and the name of the conditional vendee in the column of 'mortgagors.' Where such contracts are for goods and chattels, attached or to be attached to a building, the following provisions apply to the indorsement, entry, refiling and discharge thereof. The above-named officers, with whom such contracts are directed to be filed, shall enter the future contingency or event required to occur before the ownership of said goods and chattels shall pass from the vendor to the vendee, the amount due upon such contract, and the time when due, and shall file every such contract presented to them for that purpose, and indorse thereon its number and time of receipt; they shall enter in a book provided for that purpose, in separate columns, the names of all the parties to each contract so filed, arranged in alphabetical

order, under the head of 'vendees' and 'vendors,' the number of such contract and the date of the filing thereof, and under a column headed 'property,' they shall enter a brief description sufficient for identification of the land upon which said building stands, and if in a city or village, its location by street and number, if known, and if in a city or county where the block system of recording and indexing conveyances is in use, the section and block in which the said land is situated. The said officers shall also keep an index, so as to afford correct and easy reference to the books containing the entries in regard to such last-named contracts. In all cities and counties where the block system of recording and indexing conveyances is in use, the index shall be arranged according to the block numbers. A contract for the conditional sale of goods and chattels, attached or to be attached to a building, shall be invalid as against creditors of the conditional vendee and against subsequent purchasers or mortgagees in good faith of such goods and chattels or of the premises upon which the said building stands, after the expiration of the first or any succeeding term of one year, reckoning from the time of the first filing, unless: (1) within thirty days preceding the expiration of such term a statement containing a description of such contract, the names of the parties, the time when and place where filed, the interest of the conditional vendor or of any person who has succeeded to his interest in the property, claimed by virtue thereof; or (2) a copy of such contract and its indorsements, together with a statement attached thereto or indorsed thereon, showing the interest of the conditional vendor or of any person who has succeeded to his interest in the contract, is filed in the office where the contract was originally required to be filed; provided, however, if at the time such contract was executed the premises whereon the said building stands was then in the county of New York but is now located in the new county of Bronx, then such statement or a copy of such contract must be filed in the office of the register of the county of Bronx; and the officer with whom such statement or copy of such contract must be filed, as in this section provided, shall enter, in a separate column, in the book above provided for, in a column headed 'date of refiling,' the date of the refiling of the said contract. The officers performing services under this article are entitled to receive the same fees as for like services relating to chattel mortgages. Upon the title to the goods and chattels affected by any such last-mentioned contract becoming absolute in the conditional vendee or his suc-

cessor in interest by the payment of the full consideration for which any such contract was made, the conditional vendor, his assignee or legal representative, upon the request of the conditional vendee or of any person interested in the property covered by such contract, must sign and acknowledge a certificate setting forth such payment. The officer with whom such contract is filed must, on receipt of such certificate, file the same in his office and write the word 'discharged' in the book where the contract is entered, opposite the entry thereof, and the contract is thereby discharged."

Sec. 5-a. Discharge, Chattels Attached to Real Property.

Section 64a of the Personal Property Law prescribes a procedure for the discharge of the lien of a contract of conditional sale of chattels attached to real property, as follows:

"The lien upon real property of a contract for the conditional sale of goods and chattels, attached or to be attached to a building, filed as provided in this article in the office of a register of deeds or county clerk, may also be discharged in the following manner: Either before or after the beginning of any action or proceeding to enforce the lien upon such property of any such contract, the owner of such real property or of the building thereon may execute an undertaking with two or more sufficient sureties, who shall be freeholders, to the clerk or register of deeds of the county where the premises are situated, in such sum as a justice of the supreme court or the county judge may direct, not less than the amount due and to become due upon such contract, conditioned for the payment of any judgment which may be rendered against such real property or building on account of such contract. The sureties shall together justify in double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before a justice of the supreme court or the county judge at the time and place therein mentioned, must be served upon the conditional vendor or his attorney not less than five days before such time. Upon the approval of the undertaking by the judge or justice an order shall be made discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of such bond or undertaking by two sureties; and such company, if excepted to, shall justify through its officers or attorney in the manner required by law of fidelity and surety companies. Any such company may execute any such bond or undertaking as surety by the hand of its officers, or attorney, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of such company, shall be filed with each bond or undertaking. If the conditional vendor cannot be found, or does not appear by attorney, such service may be made by leaving a copy of such undertaking and notice at the conditional vendor's place of residence or if a corporation at its principal place of business within the state as stated in the contract, with a person of suitable age and discretion therein, or if the house of his abode or its place of business

is not stated in said contract and is not known, then in such manner as the court may direct. The premises, if any described in the contract as the vendor's residence or place of business shall be deemed his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person serving the papers or directing the service had knowledge to the contrary."

Sec. 6. Conditional Sale of Railroad Equipment or Rolling Stock.

A distinct section of the Personal Property Law is devoted to the filing of contracts for the conditional sale of railroad equipment and rolling stock. Section 61 thereof provides: "Whenever any railroad equipment and rolling stock is sold, leased or loaned under a contract which provides that the title to such property, notwithstanding the use and possession thereof by the vendee, lessee or bailee, shall remain in the vendor, lessor or bailor, until the terms of the contract as to the payment of installments, amounts or rentals payable, or the performance of other obligations thereunder, are fully complied with, and that title to such property shall pass to the vendee, lessee or other bailee on full payment therefor, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee or bailee for a valuable consideration, without notice, unless

1. Such contract is in writing, duly acknowledged and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of such vendee, lessee or bailee; and unless

2. Each locomotive or car so sold, leased or loaned, has the name of the vendor, lessor or bailor, or of the assignee of such vendor, lessor or bailor, plainly marked upon both sides thereof, followed by the word owner, lessor, bailor or assignee, as the case may be."

This section does not apply to chattels used upon a mere temporary road of rails, having none of the characteristics of a common carrier, such as locomotives which are used by a contractor in construction work and which are not capable of use in the usual operation of trains upon a railroad.¹² Where a mortgage of railroad property is foreclosed and the property is bid in by the bondholders, they are subsequent purchasers in good faith within this section.¹³

Sec. 7. Who May Attack for Failure to File or Refile.

a. *Parties to Contract.*—A contract of conditional sale is valid and enforceable between the parties though it is not filed.¹⁴

12. *In re Ferguson Contracting Co.*, 183 Fed. 830.

13. *Westinghouse Elec. & Mfg. Co. v. New Paltz, etc., Traction Co.*, 32 Misc. 132, 65 N. Y. Supp. 644.

14. *Crocker-Wheeler v. Genesee Recreation Co.*, 160 App. Div. 373,

145 N. Y. Supp. 477; *Creamery Package Mfg. Co. v. Horton*, 178 App. Div. 467, 165 N. Y. Supp. 257; *Spector v. Solomon*, 166 N. Y. Supp. 764; *Rodney Hunt Machine Co. v. Stewart*, 57 Hun 545, 11 N. Y. Supp. 448.

b. *Purchaser*.—The condition in an unfiled contract of conditional sale is ineffective as against a subsequent purchaser in good faith from the vendee.¹⁵ But a purchaser from the conditional vendee with actual notice of the conditional contract is not a purchaser in good faith and cannot attack the condition on the ground of failure to file the contract.¹⁶ Where the subsequent purchase is by installments, the purchaser is protected as to payments made prior to discovering that his vendor had only a conditional title, but as to payments subsequently made, he is not a purchaser in good faith.¹⁷ A person purchasing under a sale under execution is a subsequent purchaser within the meaning of the statute.¹⁸

Independently of the statute, in some cases, a *bona fide* purchaser of the property from the vendee can claim a title superior to that of the conditional vendor.¹⁹

c. *Mortgagee*.—As against a subsequent mortgagee in good faith from the vendee, a contract of conditional sale must be filed or the

15. *Bowen v. Dawley*, 116 App. Div. 568, 101 N. Y. Supp. 878; *Van Leen-wan v. Fish*, 28 Misc. 443, 59 N. Y. Supp. 183; *Nichols v. Potts*, 35 Misc. 273, 71 N. Y. Supp. 765; *Gerber v. Mandel*, 56 N. Y. Supp. 1030. See also *Tobenkin v. Piermont*, 116 N. Y. Supp. 718; *Ryan v. Wollowitz*, 25 Misc. 498, 54 N. Y. Supp. 988.

16. *Tompkins v. Fonda Glove Lining Co.*, 188 N. Y. 261; *Bowen v. Dawley*, 116 App. Div. 568, 101 N. Y. Supp. 878; *Creamery Package Mfg. Co. v. Horton*, 178 App. Div. 467, 165 N. Y. Supp. 257; *Spector v. Soloman*, 166 N. Y. Supp. 764.

The defense that the contract was subject to the law relative to conditional sales, and that the sale should be held absolute in favor of the defendant because no copy of the contract of sale was filed as required by the statute, is available only to a *bona fide* purchaser, and cannot be presented for the first time upon an appeal. *Hopkins v. Davis*, 23 App. Div. 235, 48 N. Y. Supp. 745.

Insolvency of Conditional Vendee.—The conditional vendor cannot show that the vendee was insolvent at the time a subsequent purchaser took a conveyance of the property. The evidence is not competent to show that the subsequent purchase was not in good faith. *Lathrop v. Selleck*, 70 App. Div. 357, 74 N. Y. Supp. 101.

17. *Bowen v. Dawley*, 116 App. Div. 568, 101 N. Y. Supp. 878, wherein the court said: "The only object of the statute we are considering is to protect an innocent vendee. It is not enacted to operate injuriously to the holder of a superior title, or as a penalty against him for omitting to file his contract of sale. If the vendee, before he has parted with the full purchase price of his contract, receives notice of the existing title if the prior vendor seeks to retake situation as if the prior contract had been filed. He is indemnified as to all payments which have been made in the prior vendor, he is in the same property. The payments of the last vendee are a lien upon the property down to the time of notice. If, by reason of the notice, he desires to terminate his contract with his vendor, he can return the property to him, sue him for the money he has already paid him, and for any damages which may have resulted to him by reason of the defective title of the vendor. This interpretation of the agreement seems to be an equitable one, and does no violence to the statute."

18. *Harris v. Gunn*, 37 Misc. 796, 77 N. Y. Supp. 26.

19. See *supra*, the subdivision *Common-law Doctrine of Conditional Sales*, p. 217.

sale is deemed absolute.²⁰ The burden rests upon the mortgagee to show that he took his conveyance in good faith.²¹ The mere fact that the mortgagee parted with value is not sufficient to show his good faith; want of notice of plaintiff's rights must be shown.²² Where a conditional contract of sale has been filed, the omission to refile it at the expiration of the year does not render it void as against a person who claims under a chattel mortgage executed to him by the vendees prior to the expiration of the year, and who purchased the property at the sale under a foreclosure thereof had after the expiration of the year, although notified that the vendees were not the owners of the property.²³

d. *Pledgee*.—A pledgee of the property from the vendee is now expressly protected, though such was not the case in the early history of the statute.²⁴

e. *Mortgagee or Vendee of Realty to Which Property is Annexed*.—Where property is sold under a contract of conditional sale and the vendee annexes the same to real property so that it becomes a part thereof, a purchaser or mortgagee in good faith of the realty may attack the condition of the sale under the statute.²⁵ And where the reservation of title is of no avail as against a mortgagee of the realty, it is ineffective as against a purchaser upon the foreclosure of the mortgage, as his title is measured by that of the mortgagee.²⁶ A vendee or mortgagee to successfully attack the condition in the sale must show that he was a purchaser or mortgagee in good faith,²⁷ and the burden is

20. *Berner v. Kaye*, 14 Misc. 1, 35 N. Y. Supp. 181; *Vincinguerra v. Fagan*, 57 Misc. 224, 109 N. Y. Supp. 317; *Seger & Gross Co. v. Maclaire*, 165 N. Y. Supp. 423; *Auto Mortgage Co. v. Montigny*, 168 N. Y. Supp. 670. See also *Rodney Hunt Mach. Co. v. Stewart*, 57 Hun 545, 11 N. Y. Supp. 448.

21. *Berner v. Kaye*, 14 Misc. 1, 35 N. Y. Supp. 181.

22. *Berner v. Kaye*, 14 Misc. 1, 35 N. Y. Supp. 181.

23. *American Box Machine Co. v. Zentgref*, 45 App. Div. 522, 61 N. Y. Supp. 417.

24. *Canton, etc., Dental Co. v. Webb*, 16 N. Y. Supp. 932; *Kauffman v. Klang*, 16 Misc. 379, 38 N. Y. Supp. 56.

25. *Kirk v. Crystall*, 118 App. Div. 32, 103 N. Y. Supp. 17; *Klein v. Cohen*, 142 App. Div. 500, 127 N. Y. Supp. 171; *Nichols v. Potts*, 35 Misc. 273, 71 N. Y. Supp. 765; *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 134 N. Y. Supp. 61.

A contract for the conditional sale

of chattels to be attached to a building is void as against a *bona fide* purchaser of the premises if not filed until after they were furnished by the vendor. *Klein v. Cohen*, 142 App. Div. 500, 127 N. Y. Supp. 171.

26. *Central Union Gas Co. v. Browning*, 210 N. Y. 10; *East New York, etc., Woodworking Co. v. Halpern*, 140 App. Div. 201, 125 N. Y. Supp. 111.

27. *Duffus v. Howard Furnace Co.*, 8 App. Div. 567, 40 N. Y. Supp. 925.

The lien of a building loan mortgage on mantelpieces sold to the owner under a conditional sale and actually affixed to the realty, where the contract of sale is not filed, is superior to the lien of the conditional vendor, though advances were made on the mortgage subsequent to the filing of the contract of conditional sale, where the mortgagee has no knowledge of the conditional contract when making advances on the mortgage. *East New York, etc., Woodworking Co. v. Halpern*, 140 App. Div. 201, 125 N. Y. Supp. 111.

upon him to show his good faith in taking the conveyance.²⁸ Where the sole consideration for a mortgage is a pre-existing debt, the mortgagee is not *bona fide*.²⁹

Independently of the statute in some cases, a purchaser or mortgagee of the realty in good faith may acquire a title to property conditionally sold and affixed to the realty.³⁰

f. *Creditor.* — The statute relative to conditional sales is materially different from that requiring the filing of chattel mortgages, in that creditors of the mortgagor can attack the mortgage if not filed, but creditors of a conditional vendee cannot attack the contract of conditional sale on that ground.³¹ Nor is the statute available to an officer levying upon the property with process against the conditional vendee.³²

28. Crocker-Wheeler Co. v. Genesee Recreation Co., 140 App. Div. 726, 125 N. Y. Supp. 721.

Prior Real Estate Mortgage. — Where the property has been placed on the premises of the conditional vendee which he had mortgaged before the conditional sale and delivery, the mortgagees cannot hold the property as against the conditional vendor unless they show that they have made advances thereon between the date of the conditional sale and the filing of the contract of sale, and further, that the advances were made in ignorance of the continuing title of the conditional vendor. *Nichols v. Potts*, 35 Misc. 273, 71 N. Y. Supp. 765. Compare *Mechanics and Traders' Bank v. Bergen Heights Realty Corp.*, 137 App. Div. 45, 122 N. Y. Supp. 33; *Washington Trust Co. v. Morse Iron Works and Dry Dock Co.*, 106 App. Div. 195, 94 N. Y. Supp. 495, *mod.*, 187 N. Y. 307.

29. *Duffus v. Howard Furnace Co.*, 8 App. Div. 567, 40 N. Y. Supp. 925.

30. See *supra*, the subdivision *Property to Be Annexed to Realty*, p. 218.

31. *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705; *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 140 App. Div. 726, 125 N. Y. Supp. 721; *Canton, etc., Dental Co. v. Webb*, 16 N. Y. Supp. 932. *Matter of Hamil*, 236 Fed. 292. See also, *Spector v. Solomon*, 166 N. Y. Supp. 764.

The statute does not apply in favor of judgment creditors of the conditional vendee, but only to "subsequent purchasers, pledgees or mortgagees." *Scherl v. Flam*, 129 App. Div. 561, 114 N. Y. Supp. 86.

Creditors of Purchaser from Vendee. — The failure to refile a contract of conditional sale does not make it void as to creditors of one who purchased from the conditional vendee. *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 140 App. Div. 726, 125 N. Y. Supp. 721.

32. *Fennekoh v. Gunn*, 59 App. Div. 132, 69 N. Y. Supp. 12.

g. *Trustee in Bankruptcy*.—A trustee in bankruptcy represents the creditors of the bankrupt and also the bankrupt. But as neither can attack a conditional contract on the ground that it was not filed, it necessarily follows that the trustee of the vendee cannot upon that ground attack such contract.³³

33. *Hewitt v. Berlin Machine Works*, 194 U. S. 286; *Matter of Hamil*, 236 Fed. 292; *Crocker-Wheeler Co. v. Genesee Recreation Co.*, 140 App. Div. 726, 125 N. Y. Supp. 721; *Creamery Package Mfg. Co. v. Horton*, 178 App. Div. 467, 165 N. Y. Supp. 257. See also *Skilton v. Codington*, 185 N. Y. 80, 88.

CHAPTER XVIII.

RIGHTS AND REMEDIES OF VENDOR.

Sec. 1. Recovery and Sale of Property.

- a. Recovery in General.
- b. Necessity of Sale upon Recovery.
- c. Notice of Sale.
- d. Disposition of Proceeds of Sale.
- e. Action for Deficiency.

2. Action for Conversion.

- a. In General.
- b. Necessity of Demand.
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d. Jurisdiction of Municipal Court of New York City.

3. Action for Purchase Price.

- a. In General.
- b. When Vendee Refuses to Accept Goods.
- c. Against Guarantor of Contract.
- d. Contract Payable in Installments.

4. Action to Foreclose Lien.

- 5. Action for Damages for False Representations Inducing Sale.
- 6. Election of Remedies.

Sec. 1. Recovery and Sale of Property.

a. *Recovery in General.*—Where property is sold under the condition that the title shall remain in the vendor until payment of the purchase price, if the vendee fails to make the payment at the specified time, the vendor is entitled to resume possession of the property.¹ This he may do by a seizure of the property,

1. *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705; *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, *aff'd*, 191 N. Y. 387.

Creditors of Vendee.—The vendor, in case the condition is not fulfilled, has the right to repossess himself of

the property, as against the vendee, and also as against the vendee's creditors, should the latter cause the property to be levied upon under process issued to enforce the collection of their debts. *Frank v. Batten*, 49 Hun 91, 1 N. Y. Supp. 705.

or, if the vendee will not voluntarily permit the vendor to take the goods, by an action of replevin for the recovery thereof.²

A demand for the property is essential to the maintenance of an action of replevin by the vendor to recover the same.³ The required demand may properly be made by mail, and the presumption that a letter, properly addressed and mailed, reaches the addressee is not overcome by his statement that he never received it.⁴ A demand is not established by proof of a mere demand for the money due; it must be accompanied by a demand in the alternative for the chattel itself.⁵ The vendor until default has no possession or right of possession which will enable him to maintain an action of replevin.⁶ The vendor cannot recover the property where the vendee has tendered payment which the vendor has refused.⁷ Where a purchaser of the property from the conditional vendee has sold the same before the vendor brought an action of replevin for its recovery, such purchaser is not liable therein.⁸

Where several distinct chattels are sold upon condition that the title shall not pass to the vendee until the agreed price is paid, and the vendor, in affirmance of the contract, seizes the chattels for the avowed purpose of selling them and collecting the amount

2. After judgment in an action of replevin by the conditional vendor, whereby the vendor recovers the property of the assignee of the vendee, the vendor cannot maintain an action to cut off any lien which the assignee for creditors of the vendee might have in the property, as the theory of such an action is in direct conflict with the recovery in the former action. *Campbell Printing Press Co. v. Walker*, 43 Hun 449.

Counterclaim for Breach of Warranty.—In an action by a vendor to recover the property or the purchase price thereof, the buyer may defend by pleading a breach of warranty by way of recoupment in diminution or

extinction of the price. *Peuser v. Marsh*, 218 N. Y. 505. *Compare Spaus v. Stolwein*, 134 N. Y. Supp. 603.

3. Moran v. Abbott, 26 App. Div. 570, 50 N. Y. Supp. 337; *Heinrich v. Van Wrickler*, 80 App. Div. 250, 80 N. Y. Supp. 226.

4. Moran v. Abbott, 26 App. Div. 570, 50 N. Y. Supp. 337.

5. Moran v. Abbott, 26 App. Div. 570, 50 N. Y. Supp. 337.

6. Savall v. Wauful, 21 Civ. Pro. R. 18, 16 N. Y. Supp. 219.

7. Kindelberger v. Kunow, 122 App. Div. 158, 106 N. Y. Supp. 597.

8. Murray v. Lese, 86 N. Y. Supp. 581.

due, he has no right to seize and sell or retain more than is sufficient to satisfy his demand and expenses.⁹

Where the conditional vendee, when sued for the purchase price, pleads his infancy as a defense to the action, the appropriate remedy of the vendor is an action of replevin for the recovery of the property.¹⁰ Where, in an action of replevin to recover the property sold conditionally, the defendant interposed the defense of infancy and a counterclaim for the amount paid on the property, it was held that the defense set up would have been valid had the action been on contract, but that the defense was not effectual in a tort action such as replevin.¹¹

b. *Necessity of Sale upon Recovery.*—By reason of section 65 of the Personal Property Law, it becomes necessary for the vendor, after retaking possession of the property, to retain for thirty days and then sell the same as provided by that and the following sections. If he fails so to do he may be liable to the vendee for sums paid by the latter.¹² This statute provides as follows: “ Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest may comply with the terms of such contract, and thereupon

9. *O'Rourke v. Hadcock*, 114 N. Y. 541.

10. *Wheeler & Wilson Mfg. Co. v. Jacobs*, 2 Misc. 236, 21 N. Y. Supp. 1006.

11. *Wheeler & Wilson Mfg. Co. v. Jacobs*, 2 Misc. 236, 21 N. Y. Supp. 1006.

12. See *supra*, the subdivision *Recovery of Payments*, p. 245.

Duty to Foreclose.—A vendor of personal property sold under a conditional contract of sale cannot hold both the property and the purchase price. If the vendee fails to pay the purchase price in full and the vendor

for that reason takes possession of the property, it is his duty to foreclose his lien for the unpaid purchase price and sell the property, paying the surplus to the vendee. *Dougherty v. Neville*, 108 App. Div. 89, 95 N. Y. Supp. 806, *aff'd*, 186 N. Y. 578, *mem.*

Private Sale.—The statute does not prohibit the conditional vendor from disposing of his title either before or after the retaking, provided he or his successor in title can and does thereafter comply with the statute. *Siegel v. Rieser*, 97 Misc. 684, 162 N. Y. Supp. 391.

receive such property. After the expiration of such period, if such terms are not complied with, the vendor or his successor in interest may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof."

c. *Notice of Sale.*—Section 66 of the Personal Property Law prescribes the notice to be given upon such a sale. It provides: "Not less than fifteen days before such sale, a printed or written notice shall be served personally upon the vendee, or his successor in interest, if he is within the county where the sale is to be held; and if not within such county, or he cannot be found therein, such notice must be mailed to him at his last known place of residence.

Such notice shall state:

1. The terms of the contract.
2. The amount unpaid thereon.
3. The amount of expenses of storage.
4. The time and place of the sale, unless such amounts are sooner paid."^{12a}

d. *Disposition of Proceeds of Sale.*—The disposition of the proceeds arising upon a sale under the two preceding subdivisions is regulated by section 67 of the Personal Property Law. This section is as follows: "Of the proceeds of such sale, the vendor or his successor in interest may retain the amount due upon his contract, and the expenses of storage and of sale; the balance thereof shall be held by the vendor or his successor in interest, subject to the demand of the vendee or his successor in interest, and a notice that such balance is so held shall be served personally or by mail upon the vendee or his successor in interest. If such balance is not called for within thirty days from the time of sale, it shall be deposited with the treasurer or chameberlain of the city or village, or the supervisor of the town where such sale was held, and there shall be filed there-

12a. *Computation of Time.*—In construing section 66, the date of mailing and the date of service must be considered as synonymous, to be excluded in reckoning time and a notice mailed on September 17th is sufficient for a sale on October 2nd. Kurzweil

v. Story & Clark Piano Co., 95 Misc. 484, 159 N. Y. Supp. 231.

Notice of sale may be given before the expiration of the thirty-day period. Freeman v. Engel, 168 N. Y. Supp. 1014.

with a copy of the notice served upon the vendee or his successor in interest and a verified statement of the amount unpaid upon the contract, expenses of storage and of sale and the amount of such balance. The officer with whom such balance was deposited shall credit the vendee or his successor in interest with the amount thereof and pay the same to him on demand after sufficient proof of identity. If such balance remains in possession of such officer for a period of five years, unclaimed by the person legally entitled thereto, it shall be transferred to the funds of the town, village or city, and be applied and used as other moneys belonging to such town, village or city."

e. *Action for Deficiency.* — If, upon a sale pursuant to the above statute, the property sells for less than the amount due the vendor upon the contract, he may sue the vendee for the deficiency.¹³ But when the provisions of the statute are not complied with, the conditional vendor, upon retaking the goods and selling the same, cannot recover a judgment for a deficiency arising upon such sale against a person purchasing the property before the retaking from the conditional vendee.¹⁴

Sec. 2. Action for Conversion.

a. *In General.* — After the vendee has defaulted in payment the vendor is entitled to the possession of the property, and if the vendee or any other person keeps such possession from the vendor, or transfers the property in violation of the vendor's rights, an action for damages for the conversion of the property may be maintained. Thus, the vendee is liable for conversion if he sells or mortgages the property without the consent of the vendor, though the title of such subsequent purchaser or mortgagee is good because the original contract of sale is not filed.¹⁵ Where a mortgagee from the conditional vendee does not acquire a title superior to the vendor, he is liable to the latter for con-

13. Ackerman *v.* Rubens, 167 N. Y. 405; Warner *v.* Zuechel, 19 App. Div. 494, 46 N. Y. Supp. 569.

14. Nelson *v.* Gibson, 143 App. Div. 894, 129 N. Y. Supp. 702.
15. Rodney Hunt Mach. Co. *v.* Stewart, 57 Hun 545, 11 N. Y. Supp. 448.

version if he forecloses the mortgage and disposes of the property.¹⁶ Where an officer with process against the vendee levies upon the property and sells the same with notice of the conditional title of the vendee, he is liable to the vendor for conversion.¹⁷ And where the property is annexed by the conditional vendee to realty, the owner of the realty, if he does not acquire by the annexation rights superior to the vendor, may be liable to the latter for the conversion of the property.¹⁸ A conditional vendor cannot recover in conversion without showing that he is entitled to the possession of the property and that the vendee is in default.¹⁹

b. *Necessity of Demand.* — Unless the vendee actually converts the property in such a manner that a demand therefor would be of no avail, the vendor cannot sue the vendee for the conversion thereof without a demand.²⁰ Where the conditional vendee is permitted after default in the payment of the purchase price to remain in possession of the property, the act of a third party in purchasing the property from the vendee is not necessarily wrongful and a demand of the property from such purchaser is necessary before an action for conversion will lie against him.²¹

c. *Damages.* — While, in an action of conversion against a stranger, the conditional vendor may recover the value of the property converted, in an action against the vendee or his successor in title, the recovery is limited to the amount unpaid upon the contract.²²

d. *Jurisdiction of Municipal Court of New York City.* — An action against a storage warehouse company for the conversion of chattels sold under a contract of conditional sale and delivered by the conditional vendee to such warehouse company

16. *Iden v. Sommers*, 29 J. & S. 177, 18 N. Y. Supp. 779.

20. *Katz v. Diamond*, 16 Misc. 577, 38 N. Y. Supp. 766.

17. *Cole v. Mann*, 62 N. Y. 1.

21. *Tompkins v. Fonda Glove Lin-*

18. *Davis v. Bliss*, 187 N. Y. 77.

ing Co., 188 N. Y. 261.

19. *Klein v. Cohen*, 142 App. Div. 500, 127 N. Y. Supp. 171.

22. *Davis v. Bliss*, 187 N. Y. 77.

cannot be maintained in the Municipal Court of New York city, as such an action is prohibited by section 73 of the Municipal Court Act.²³

Sec. 3. Action for Purchase Price.

a. *In General.* — A conditional vendor may, at his election, treat the sale as absolute and recover the purchase price of the property from the vendee.²⁴ The loss or destruction of the property by fire or otherwise does not excuse the vendee from the payment of the purchase price.²⁵ But the vendor bears the risk of transportation. Thus, where a set of law books were sold under a conditional contract, the volumes to be delivered as published, and one volume was lost in transit, it was held that the vendor could not maintain an action for the recovery of the purchase price of the set.²⁶

b. *When Vendee Refuses to Accept Goods.* — If the conditional vendee refuses to accept the goods upon delivery thereof, the vendor may hold the same for the vendee and recover the

23. *Jacob v. Columbia Storage Warehouses*, 125 App. Div. 556, 109 N. Y. Supp. 1015.

24. *Equitable Gen. Prov. Co. v. Potter*, 22 Misc. 124, 48 N. Y. Supp. 647; *Smedback v. Wolffe*, 21 Misc. 82, 46 N. Y. Supp. 968; *Reedy Elevator Co. v. Berman*, 107 N. Y. Supp. 59; *Norton v. Abbott*, 113 N. Y. Supp. 669. See *infra*, the subdivision *Election of Remedies*, p. 241.

A condition in a contract that if a vendee fails to perform any condition of the agreement of sale, so much of the price as is unpaid at the time of such failure shall become due and payable without demand, is not unconscionable. *Equitable Providing Co. v. Eisentrager*, 34 Misc. 179, 68 N. Y. Supp. 866.

25. *Ainsworth v. Rhines*, 34 Misc.

372, 69 N. Y. Supp. 876; *National Cash Register Co. v. South Bay, etc., Assoc.*, 64 Misc. 125, 118 N. Y. Supp. 1044.

Where property is delivered to the vendee under a conditional contract of sale and the contract requires nothing further to be done by the conditional vendor, such as the delivery of the goods or of a bill of sale, the vendor has performed his contract, and if the property is destroyed by fire, the loss falls on the vendee and he is liable to pay notes given for the purchase price thereof. *National Cash Register Co. v. South Bay, etc., Assoc.*, 64 Misc. 125, 118 N. Y. Supp. 1044.

26. *Edward Thompson Co. v. Vacheron*, 69 Misc. 83, 125 N. Y. Supp. 939.

purchase price.²⁷ A contrary doctrine has been promulgated in the Second Department to the effect that in such a case the only remedy of the vendor is an action to recover damages for the refusal to accept.²⁸

c. *Against Guarantor of Contract.* — Where a vendee of property under a conditional sale defaults in payment, his guarantor, who has stipulated that the property shall become his personal property if he be called upon to pay it, becomes substituted as vendee and after being tendered the property, retaken from the original vendee, becomes liable to the vendor for the balance unpaid thereon.²⁹

d. *Contract Payable in Installments.* — Where the purchase price is payable in installments, unless there is a provision in the contract making the whole purchase price due upon default in the payment of one installment, the vendor cannot sue for the whole purchase price until all installments are due.³⁰ He may, however, sue for and recover each installment as it matures.³¹ The right of a conditional vendor to sue in the Municipal Court of New York city for installments is expressly reserved by section 139 of the Municipal Court Act and it is immaterial whether one or all of such installments are due when the suit is brought.³²

Sec. 4. Action to Foreclose Lien.

While, strictly speaking, a conditional vendor does not have a lien upon the property,³³ he has an interest in the nature of a

27. *Gray v. Booth*, 64 App. Div. 231, 71 N. Y. Supp. 1015; *Ideal Cash Register Co. v. Zunino*, 39 Misc. 311, 79 N. Y. Supp. 504; *Cambridge Soc. v. Elliott*, 50 Misc. 159, 98 N. Y. Supp. 232.

28. *National Cash Register Co. v. Schmidt*, 48 App. Div. 472, 62 N. Y. Supp. 952, holding that the measure of damages is the difference between the contract price and the market value at the time and place of delivery and that, in the absence of proof as to any difference, the vendor is entitled to but nominal damages.

29. *Equitable Providing Co. v. Eisentrager*, 34 Misc. 179, 68 N. Y. Supp. 866; *Equitable Providing Co. v. Eisentrager*, 31 Misc. 707, 65 N. Y. Supp. 296.

30. *Taylor v. Esselstyn*, 62 Misc. 633, 115 N. Y. Supp. 1105.

31. *Gray v. Booth*, 64 App. Div. 231, 71 N. Y. Supp. 1015; *Moneyweight Scale Co. v. Mehling*, 69 Misc. 331, 125 N. Y. Supp. 532.

33. See *supra*, the subdivision *Interest of Conditional Vendor*, p. 212.

lien, and can maintain, at least in the Municipal Court of New York city, an action to foreclose the same.³⁴ The lien can be enforced in such an action to the extent of the unpaid price, but not for repairs made on the property.³⁵ A person having the actual possession of the property is a proper party defendant, but where it does not appear that he has acquired any interest therein or assumed the debt, he should not be charged with a deficiency judgment.³⁶ No demand of payment is necessary for the maintenance of the action where the contract provides that payments shall be made at a particular place or by registered mail.^{36a}

Sec. 5. Action for Damages for False Representations Inducing Sale.

Where the vendors in a contract of conditional sale have been induced to execute the contract by false representations, they may, if the vendee neglects to pay the installments of the purchase price as they become due, repossess themselves of the property, pursuant to the terms of the contract, and sue for the damages which they have suffered in consequence of the false representations.³⁷

Sec. 6. Election of Remedies.

By retaking the goods, the vendor rescinds the sale and, as a general proposition, cannot thereafter treat the sale as in effect and recover the purchase price.³⁸ But where the vendor retakes

34. See Municipal Court Act, §§ 70-77. *Singer Sewing Mach. Co. v. Leipzig*, 113 N. Y. Supp. 916; *Simpson Crawford Co. v. Knight*, 130 N. Y. Supp. 236; *Quattrone v. Simon*, 85 Misc. 357, 147 N. Y. Supp. 448; *Pinsky v. Goldsmith*, 95 Misc. 640, 159 N. Y. Supp. 848.

Counterclaim.—In an action to foreclose the lien, the buyer may assert a breach of warranty by way of defense. *Bramhall, Deane Co. v. McDonald*, 172 App. Div. 780, 158 N. Y. Supp. 736.

35. *Simpson Crawford Co. v. Knight*, 130 N. Y. Supp. 236.

36. *Singer Sewing Mach. Co. v. Leipzig*, 113 N. Y. Supp. 916.

36a. *Bloomingdale v. Braun*, 80 Misc. 527, 141 N. Y. Supp. 590; *Champion Shoe Machinery v. Landman*, 97 Misc. 642, 162 N. Y. Supp. 346.

37. *Nichols v. Coleman*, 96 App. Div. 353, 89 N. Y. Supp. 234.

38. *White v. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481; *Dougherty v. Neville*, 108 App. Div. 89, 95 N. Y. Supp. 806, *aff'd*, 186 N. Y. 578, *mem.*; *Casper v. Payne*, 111 App. Div. 785, 97 N. Y. Supp. 863, *aff'd*, 190 N. Y. 512; *Edmead v. Anderson*, 118 App. Div. 16, 103 N. Y. Supp. 369; *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702; *Ohl & Co. v. Standard Steel Sections*, 179 App. Div. 637, 167 N. Y. Supp. 184; *Earle v. Robinson*, 12 Misc. 536, 33 N. Y. Supp. 606, *aff'd*, 91 Hun 363, 36 N. Y. Supp. 178, *aff'd*, 157 N. Y. 683, *mem.*; *Moneyweight Scale Co. v. Mehling*, 69 Misc. 331, 125 N. Y. Supp. 532; *Avery v. Chapman*, 127 N. Y. Supp. 721; *Freeman v. Menks*, 153 N. Y. Supp. 361. Compare *National Cash Register Co. v. Coleman*, 85 Hun 125, 32 N. Y. Supp. 593; *Brewer v. Ford*, 54 Hun 116, 7 N. Y. Supp. 244.

Upon default in the payment by the vendee, the conditional vendor is not entitled to both the property and

the property, not absolutely, but as trustee for the vendee, he may maintain an action for the purchase price, and, in such an action, the vendee has the right to have the value of the property offset against the balance of the unpaid purchase price.³⁹

As a general proposition, by maintaining an action for the recovery of the purchase price, the vendor elects to treat the transaction as an absolute sale and cannot afterwards reclaim the property or obtain damages for its conversion.⁴⁰ To this general proposition, there is one important exception. Where the contract provides, either specifically or by necessary intend-
ment, that the vendor shall retain title until full payment is made, either with or without legal proceedings, there is nothing inconsistent in the vendor retaining the title until the satisfaction of the judgment, and while the judgment is unsatisfied, the vendor can recover the property or its value.⁴¹ A judgment for the pur-

the purchase price; if he elects to retake the property absolutely the consideration for obligations of security given for the purchase price fails, and he can neither collect upon the one nor enforce payment of the other. *Nelson v. Gibson*, 143 App. Div. 894, 129 N. Y. Supp. 702; *White v. Gray's Sons*, 96 App. Div. 154, 89 N. Y. Supp. 481.

Action on Note for Purchase Price. — Where the vendor receives part payment in cash and accepts the vendee's note for the balance of the purchase price, the commencement of an action upon the note is an election and estops the vendee from asserting title to the property conditionally sold as against one purchasing from the vendee pending the action, and the fact that the vendor discontinues the action upon the note before it proceeds to judgment is immaterial. *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008.

39. *Equitable Gen. Prov. Co. v. Potter*, 22 Misc. 124, 48 N. Y. Supp. 647; *Moneyweight Scale Co. v. Mehling*, 69 Misc. 331, 125 N. Y. Supp. 532.

40. *Avery v. Chapman*, 127 N. Y. Supp. 721; *Orcutt v. Rickenbrodt*, 42 App. Div. 238, 59 N. Y. Supp. 1008.

41. *Ratchford v. Cayuga, etc., Warehouse Co.*, 217 N. Y. 565; *Nat. Cash Register Co. v. Coleman*, 85 Hun 125, 32 N. Y. Supp. 593; *American Box Machine Co. v. Zentgref*, 45 App. Div. 522, 61 N. Y. Supp. 417; *Hobart Electric Mfg. Co. v. Rooder*, 121 N. Y. Supp. 274; *Gormully & Jeffery Mfg. Co. v. Catharine*, 25 Misc. 338, 55 N. Y. Supp. 475. See also *Brewer v. Ford*, 54 Hun 116, 7 N. Y. Supp. 244; *same case*, 59 Hun 17, 12 N. Y. Supp. 619, *aff'd*, 126 N. Y. 643.

Right of Vendor to Possession after Judgment. — Where a contract of conditional sale contains a provision that the delivery by the vendee of notes for the purchase price of the property shall not be deemed a payment or

chase price is not affected by a subsequent retaking of the property.⁴²

Where the assignor of a conditional vendor obtains a judgment against the conditional vendee foreclosing the lien upon the property sold by a contract of conditional sale, a subsequent action for conversion against the depository of the vendee cannot be maintained as the prior action is *res adjudicata* that the vendee, not the vendor, is the owner of the property.⁴³

A conditional vendor will not be deemed to have made an election of remedies when it sues for the purchase price of an article conditionally sold where the plaintiff is not advised as to all the facts and he may subsequently recover the property from a transferee of the vendee.⁴⁴

affect the vendor's title to the property unless the notes are paid in full, the fact that the vendor obtains a judgment on the notes against the vendee does not preclude the vendor from asserting his right to the possession of the goods on the non-payment of the judgment. American Box Machine Co. *Zentgref*, 45 App. Div. 522, 61 N. Y. Supp. 417.

42. *Moneyweight Scale Co. v. Mehl*ing, 69 Misc. 331, 125 N. Y. Supp. 532.

43. *Jacob v. Columbia Storage Warehouses*, 125 App. Div. 556, 109 N. Y. Supp. 1015.

44. *National Cash Reg. Co. v. Ferguson*, 25 Misc. 363, 55 N. Y. Supp. 592.

CHAPTER XIX.

RIGHTS AND REMEDIES OF VENDEE.

SEC. 1. In General.

2. Recovery of Payments.
3. Waiver of Right to Recover Payments.

Sec. 1. In General.

When the vendee is entitled to the possession of the property, he may maintain an action of replevin to recover such possession or of conversion to recover damages for his loss of possession.¹ By tendering the amount due upon the contract he becomes entitled to the possession of the property and may sue the vendor or other person withholding possession for the conversion thereof.² This right the vendee, by virtue of section 65 of the Personal Property Law, has for 30 days after the vendor retakes the property.

A vendee in possession of property under a contract of conditional sale is entitled to maintain an action to recover damages thereto caused by the negligence of a third party.^{2a}

A vendor having possession thereof, impliedly warrants his title to property sold conditionally, and, when the vendee learns that the vendor had no title thereto, he may refuse to pay more installments and may recover damages of the vendor.³

1. *Powers v. Burdick*, 126 App. Div. 179, 110 N. Y. Supp. 883.

2. *Powers v. Burdick*, 126 App. Div. 179, 110 N. Y. Supp. 883. See also *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856.

A deposit by the assignee of the vendee under a conditional sale of the balance due on a note, to which the contract is attached, at the bank where the note is held with notice to the vendor is a sufficient tender to entitle the vendee to maintain re-

plevin. *Tweedie v. Clark*, 114 App. Div. 296, 99 N. Y. Supp. 856.

2a. *Carter v. Black & White Cab Co., Inc.*, 102 Misc. 680, 169 N. Y. Supp. 441.

3. *Bowen v. Dawley*, 116 App. Div. 568, 101 N. Y. Supp. 878. But see *English v. Hanford*, 75 Hun, 428, 27 N. Y. Supp. 672, holding that no action will lie on a warranty unless the title to the property alleged to have been warranted has fully passed.

Sec. 2. Recovery of Payments.

It is provided in section 65 of the Personal Property Law that where the conditional vendor upon retaking the property does not retain and sell the same, as prescribed in that and the following sections, the vendee may recover the sums which he has paid upon the contract.⁴ Prior to the enactment of such statutes, it was held that the vendee could not recover such payments.⁵ If the vendee transfers the property, the right of recovery of the payments passes to the transferee, and the vendee loses his claim therefor.^{5a}

The statute was designed to protect vendees against overreaching vendors by preventing a vendor from exacting payments on the purchase price of personal property far in excess of the fair rental value for its use and then retaking the property and forfeiting the payments made on account of the inability of the purchaser to complete the payments as agreed.⁶ It, however,

to the buyer, and, where the purchase price falls due in installments, an action to recover damages for the breach of warranty cannot be maintained until payment in full.

4. See *supra*, the subdivision *Necessity of Sale upon Recovery*, p. 235.

Trustee in Bankruptcy.—If the vendee is adjudicated a bankrupt after the vendor has retaken the property, his trustee may recover the payments. *Leonard v. Montague*, 155 App. Div. 506, 140 N. Y. Supp. 562.

Complaint.—See *Lowy v. Hardman, Peck & Co.*, 176 App. Div. 121, 162 N. Y. Supp. 461.

5. *Empire State Type Founding Co. v. Grant*, 114 N. Y. 40; *Haynes v. Hart*, 42 Barb. 58.

Application of Statute.—It is not essential to set the provisions of the statute running that the vendor should retake the property by actually taking physical possession thereof. *Breakstone v. Buffalo Foundry & Machine Co.*, 167 App. Div. 62, 152 N. Y. Supp. 394. *Crowe v. Liquid Carbonic Co.*, 208 N. Y. 396. But the

property may be deemed "retaken" when the holder of the contract dispossesses the vendee from the premises where the property is located. *Ostrander v. Bricka*, 91 Misc. 255, 154 N. Y. Supp. 786.

5a. *Steiner v. National Cash Register Co.*, 155 N. Y. Supp. 447.

6. *Fairbanks v. Nichols*, 135 App. Div. 298, 119 N. Y. Supp. 752; *Petze v. Walters & Co.*, 166 N. Y. Supp. 1000. "The obvious purpose of the Legislature in enacting the statute governing conditional sales was to protect purchasers on the installment plan from the oppression of unconscionable dealers, to prevent the forfeiture of considerable sums paid on account by reason of the default in the payment of a small installment. The statute was wise and salutary, enacted in response to public sentiment aroused by many instances of harsh and brutal conduct perpetrated upon people quite helpless to protect themselves. Intended to be a shield against harsh and unfair conduct in strictly enforcing the technical re-

protects the vendor by making full performance a prerequisite to the acquirement of the property by the vendee.⁷

The vendee may recover the sums paid on the contract though they are referred to as rent.⁸ The statute applies to oral as well as written contracts of conditional sale.⁹ In an action to recover the sums paid, the vendor is entitled to offset the expense of the replevin suit to recover possession of the property, but cannot offset rent for the chattel during the time it was in the possession of the conditional vendee.¹⁰ But damage to the property while in the vendee's possession may be offset against the amount paid.^{10a}

The statute is not limited in its application to cases where the vendee voluntarily delivers possession of the property to the vendor; it applies where the vendor secures the property in a suit of replevin,¹¹ or even where the property is retaken in another state.^{11a} The mere fact that the property is later in the possession of the seller does not necessarily show that it was "retaken."^{11b} But a seizure and sale under an execution has been thought not to constitute a retaking.^{11c} And it has been held that the taking of the property by a city marshal under a writ of replevin in a suit by the vendor is not such a taking by the vendor as is within the provision authorizing the vendee to recover the sums paid on the contract; the property thus taken is *in custodia legis* and not in the

quirements of such contract, it never was intended to be used as a sword to enforce harsh and technical requirements." *Nyhoe v. Doll & Sons, Inc.*, 167 App. Div. 225, 228, 152 N. Y. Supp. 650.

7. *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, *aff'd*, 191 N. Y. 387.

8. *Hoffman v. White Sewing Mach. Co.*, 123 App. Div. 166, 108 N. Y. Supp. 253.

9. *Alexander v. Kellner*, 131 App. Div. 809, 116 N. Y. Supp. 98.

10. *Hoffman v. White Sewing Machine Co.*, 123 App. Div. 166, 108 N. Y. Supp. 253.

10a. *Rindone v. Hamlin*, 161 N. Y. Supp. 858.

11. *Roach v. Curtis*, 115 App. Div. 765, 101 N. Y. Supp. 333, *aff'd*, 191

N. Y. 387. But the property is not "retaken" until possession is awarded in the replevin action. *Spitaleri v. Brown*, 163 App. Div. 644, 148 N. Y. Supp. 1005.

The recovery of a judgment in an action of replevin for the possession of property sold under a conditional contract of sale by the vendor against the vendee does not bar a subsequent action by the vendee for the recovery of such sums as he paid thereon under section 65 of the Personal Property Law. *Roach v. Curtis*, 191 N. Y. 387.

11a. *Petze v. Waters & Co.*, 166 N. Y. Supp. 1000.

11b. *Maimin Co. v. Maver*, 164 N. Y. Supp. 229.

11c. *West Publishing Co. v. Gluck*, 92 Misc. 198, 155 N. Y. Supp. 514; *Quattrone v. Simon*, 85 Misc. 357, 147

custody of the vendor.¹² Where an automobile is in the garage of the conditional vendor and he refuses to let the vendee have it and rents it to another person, there is a "retaking" within the meaning of the statute.^{12a} Whether property is "retaken," to a certain extent is a question of intent.^{12b}

An action by a vendee to recover sums paid is for money had and received and is not forbidden by the Municipal Court Act relative to New York city,¹³ which may have jurisdiction of such an action.^{13a}

Sec. 3. Waiver of Right to Recover Payments.

It is a well-established rule that, after the execution of a contract of conditional sale, it is within the power of the parties to enter into a contract whereby the vendee will waive the benefits of the statute, so as to be precluded from recovering the payments he has made.¹⁴ But when an alleged waiver is made by the vendee at the time of the execution of the conditional contract of sale, a different question is presented. It was at first thought by some of the lower courts that the vendee could make a legal waiver of his right to recover the payments made, and various interesting discussions were had as to what particular words in the contract were sufficient to constitute a waiver.¹⁵ But it was finally determined by the

N. Y. Supp. 448; *Crump v. Wissner*, 163 App. Div. 47, 148 N. Y. Supp. 401.

12. *Sigal v. Hatch Co.*, 61 Misc. 332, 113 N. Y. Supp. 818, *distinguishing Roach v. Curtis*, 191 N. Y. 387.

12a. *Pflugheber v. Universal Motor Truck Co.*, 155 N. Y. Supp. 292.

12b. *Brucker v. Carroll*, 86 Misc. 412, 149 N. Y. Supp. 280.

13. *Woodman v. Medham Piano and Organ Co.*, 47 Misc. 683, 94 N. Y. Supp. 371.

13a. *Dean v. Bauer*, 101 Misc. 301, 166 N. Y. Supp. 983; *Petze v. Waters & Co.*, 166 N. Y. Supp. 1000.

14. *Adler v. Weis & Fisher Co.*, 218 N. Y. 295; *Warner v. Zuechel*, 19 App. Div. 494, 46 N. Y. Supp. 569; *Fairbanks v. Nichols*, 135 App. Div. 298,

119 N. Y. Supp. 752. *Leonard v. Montague* 155 App. Div. 506, 140 N. Y. Supp. 562; *Seeley v. Prentiss Tool & Supply Co.*, 158 App. Div. 853, 144 N. Y. Supp. 48; *Breakstone v. Buffalo Foundry & Machine Co.*, 167 App. Div. 62, 152 N. Y. Supp. 394; *Nyboe v. Doll & Sons, Inc.*, 167 App. Div. 225, 152 N. Y. Supp. 650; *Adler v. Weis & Fisher Co.*, 66 Misc. 20, 119 N. Y. Supp. 634, *aff'd*, 138 App. Div. 918; *Montague v. Wanamaker*, 67 Misc. 650, 124 N. Y. Supp. 805; *Boscher v. Multicolor Sales Co.*, 98 Misc. 637, 163 N. Y. Supp. 202; *Butler v. People's Furniture Co.*, 124 N. Y. Supp. 645.

15. See the following decisions made before the Court of Appeals

Court of Appeals that such a waiver is contrary to the public policy of the state as evidenced by the statute, and that the vendee will be permitted to recover his payments despite a clause in his contract expressly waiving the privilege of the statute.¹⁶ A mere waiver or consent, though subsequent to the retaking of the property, if it is not in the form of a contract, is also against public policy, and cannot serve to take such contracts out of the protection of the statute.¹⁷

passed on the question: *Saitch v. Kelley*, 154 App. Div. 864, 139 N. Y. Supp. 534; *Adler v. Weis & Fisher Co.*, 66 Misc. 20, 119 N. Y. Supp. 634, *aff'd*, 138 App. Div. 918; *Moore v. Bloomingdale*, 126 N. Y. Supp. 125; *Hoffman v. White Sewing Machine Co.*, 123 App. Div. 166, 108 N. Y. Supp. 253; *Woodman v. Needham Piano & Organ Co.*, 47 Misc. 683, 94 N. Y. Supp. 371; *Plumiera v. Bricks*, 79 Misc. 468, 140 N. Y. Supp. 171; *Butler v. People's Furniture Co.*, 124 N. Y. Supp. 645; *Fairbanks v. Nichols*, 135 App. Div. 298, 119 N. Y. Supp. 752; *Moore v. Bloomingdale*, 126 N. Y. Supp. 125 *Hurley v. Allman Gas Engine Co.*, 144 App. Div. 300, 129 N. Y. Supp. 14.

16. *Crowe v. Liquid Carbonic Co.*, 208 N. Y. 396. See also *Siegel v. Rieser*, 97 Misc. 684, 162 N. Y. Supp. 391.

Contract Involving Both Chattels and Labor.—Where a contract involves both the conditional sale of fixtures and the labor of installing the same for the vendee, a provision in the contract waiving the benefits of section 65 is ineffective; but the value of the labor should be deducted from the amount of the payments and the vendee can recover only the balance. *Siegel v. Rieser*, 97 Misc. 684, 162 N. Y. Supp. 391.

17. *Adler v. Weis & Fisher Co.*, 218 N. Y. 295; *Cee Bee Cee Waist & Costume Co. v. Berenstein*, 164 N. Y. Supp. 703.

Prior to the decision of the Court of Appeals, it had been held in some courts that the provisions of the statute could not be waived by executory contract. See *Hurley v. Allman Gas Engine & Machine Co.*, 144 App. Div. 300, 129 N. Y. Supp. 14.

CHAPTER XX.

FORMS.

1. Common Form of Chattel Mortgage.
2. Form Containing Clauses for Insurance of Property, Prohibition of Removal or Levy, etc.
3. Mortgage for Future Advances.
4. Mortgage on Property Annexed to Realty.
5. Farm Lease Containing Mortgage Clause.
6. Power of Attorney to Foreclose.
7. Complaint in Action to Foreclose Mortgage.
8. Bond for Seizure of Chattel under section 207 of the Lien Law.
9. Affidavit for Warrant for Seizure of Chattel.
10. Warrant for Seizure of Chattel.
11. Assignment of Mortgage.
12. Satisfaction of Mortgage.
13. Statement of Mortgagor on Renewal of Mortgage.
14. Statement of Mortgagor on Refiling Copy of Mortgage.
15. Notice of Sale under Chattel Mortgage.
16. Contract of Conditional Sale.
17. Contract of Conditional Sale in the Form of a Lease.
18. Notice of Sale by Conditional Vendor Retaking Property.

No. 1.

COMMON FORM OF CHATTEL MORTGAGE.

To all to whom these presents shall come:

KNOW YE, That , of , county of ,
N. Y., indebted unto , of , in the sum of
dollars, and cents, being for (a).

NOW FOR SECURING THE PAYMENT of said debt, and the interest thereon from the date hereof, to the said , do hereby SELL, TRANSFER and ASSIGN to the said , the property described in the following SCHEDULE, viz.: (*Description of property.*)

Said property now being and remaining in the possession of the said , at (b).

PROVIDED ALWAYS, and this mortgage is on the express condition, that if the said , shall pay to the said , h assigns or representatives, the sum of dollars and cents, with interest thereon as follows, viz.:

Principal and interest payable at , which the said hereby agree to pay, then this transfer to be void and of no effect; (c) but in case of non-payment of the said debt and interest at the time above mentioned, then the said shall have full power to enter upon the premises of the said part of the first part, or any other place or places where the goods and chattels aforesaid may be, to take possession of said property, to sell the same at public or private sale, and the avails (after deducting all expenses of the taking, and the sale, and keeping of said property) to apply in payment of the above debt; (d) and in case the said shall at any time deem said property or debt unsafe, it shall be lawful for to take possession of such property, and to sell the same at public or private sale, previous to the time above mentioned for the payment of said debt, applying the proceeds as aforesaid, after deducting all expenses for the taking, and the sale and keeping of the said property. And the said mortgagee, his representatives or assigns, may purchase at any such sale, in the same manner, and to the same effect as a person not interested herein.

If from any cause said property shall fail to satisfy said debt, interest, costs and charges, covenant and agree to pay the deficiency.

IN WITNESS WHEREOF, have hereunto set hand and seal the day of , in the year of our Lord, one thousand nine hundred and

Sealed and delivered in the presence of

..... (L. S.)

STATE OF NEW YORK, }
County of , } ss.:
of

On this day of , in the year one thousand nine hundred and , before me, the subscriber, personally appeared , to me personally known to be the same person described in and who executed the foregoing instrument, and he acknowledged that he executed the same.

No. 2.

FORM CONTAINING CLAUSES FOR INSURANCE OF PROPERTY, PROHIBITION OF REMOVAL OR LEVY THEREON, ETC.

(As in Form 1 to (a) and then continuing): Collateral security for the payment of a certain note made by me, the said (mortgagor) , and bearing even date herewith, and due

In days from the date hereof, and payable at ; and it is further agreed that this mortgage shall be as collateral security for the payment of any judgment into which said note may be merged, together with all costs and disbursements incurred in procuring said judgment. (Continue as in Form 1 to (b), then add):

And I further certify and state that I am the sole owner of the property mentioned in said schedule, and that the same is free and clear of all liens and encumbrances; this statement is made for the purpose of obtaining money on said note.

And it is further agreed that in case any attachment, levy or other legal process shall become a lien on said property before the maturity of this mortgage, that then and in that case, this mortgage shall immediately become due and payable.

And it is further agreed that in case the mortgagor herein shall remove said property from the place where it now is, without the written consent of the party of the second part, that this mortgage shall at once become due and payable, and the said mortgagee may take immediate possession of said property.

And it is further agreed that the said mortgagor will keep said property insured in a sum not less than \$, and assign the policy to the said party of the second part, and in default thereof, the said party of the second part may effect such insurance, and the cost of said policy may be added to the amount secured by these presents, and such sum so paid shall be a lien upon the said property.

(Continue as in Form 1 to the end.)

No. 3.

MORTGAGE FOR FUTURE ADVANCES.

(As in Form 1 to (a) and then continuing): This grant is intended as a security for the payment of any debt, demand or liability now incurred or held by the said , or which may hereafter be incurred or held by the said (mortgagee), on account of, or against the said (mortgagor), and also a security against any liability of said (mortgagee), by reason of, or on account of any endorsement or undertaking which has been, or may hereafter be made or incurred by said (mortgagee), for said (mortgagor), and this mortgage is to be a continuing security for the above, and all costs and expenses to the amount \$.

(Continue as in Form 1, between (c) and (d), as follows): And it is further agreed that upon default being made by said , to pay any debt or obligation held by said (mortgagee), or on which he might be liable, when presented for

payment, or at maturity said , may take possession of the said property, and for that purpose shall have full power to enter upon the premises of the said party of the first part, or other place where the goods and chattels aforesaid may be, and may sell the same at public or private sale at such time and on such terms, and in such manner as said may deem most advantageous. (Continue as in Form 1 to the end.)

No. 4.

MORTGAGE ON PROPERTY ANNEXED TO REALTY.

(As in Form 1 to (b), and then continuing): It is an express condition of this mortgage, and it is agreed that said property above described, shall be and remain personal property, until the debt above described is fully paid, notwithstanding the manner in which such property or any part thereof, shall be affixed to the realty. (Continue as in Form 1 to the end.)

No. 5.

FARM LEASE CONTAINING MORTGAGE CLAUSE.

(As in ordinary lease, continuing): The said (tenant) , agrees that all the personal property on said land or hereafter brought on, shall be, and the same hereby is bound to said , for the faithful performance of all the covenants contained in this lease, and as collateral security for all the rent due and to become due for said land, and for any and all sums now or hereafter to be due, or owing from said , to said and said , also hereby agrees that all said personal property, and the crops raised and to be raised on said land, and the cows and all the increase thereof, shall be bound to, and hereby are bound to said , as collateral security for the faithful performance of all the covenants contained in this lease, and for the payment of said rent due, and to become due, and for any and all sums now due or hereafter to become due and owing from said , to said , for any cause whatever, and for this purpose said , shall have the title to all said personal property of whatever kind raised, made, produced, kept, put or used upon said farm, and he shall have the right of possession thereof at any time, and such title and right of possession is vested in said as collateral security for the faithful performance of all the covenants contained in this lease including the payment of rent due, and to become due, and any and all sums of money owing or to be hereafter due and owing from said , to said . (Continue as in ordinary lease.)

No. 6.

POWER OF ATTORNEY TO FORECLOSE.

I, do hereby nominate and appoint as and for my true and lawful attorney, for me and in my name to take possession of the goods and chattels, described in the within mortgage (or, if the power to foreclose is written on a different paper, describe the mortgage), and to foreclose the said mortgage by a sale of said goods and chattels, in conformity with the power therein contained, and I authorize my said attorney to do all acts for me and in my behalf, which I, under the said power and under said mortgage could lawfully do, and for that purpose to procure the aid or assistance of any person or persons.

And I also covenant with the said , that the sum of dollars, and interest thereon from the day of , 19 , is now justly owing to me on the said mortgage, that I am the lawful owner and holder thereof, and that I will indemnify and hold him harmless for any acts done by him in carrying out and executing the power hereinbefore granted to him.

Dated, this day of , 19 .

(Signed)

.....(L. S.)

No. 7.

COMPLAINT IN ACTION TO FORECLOSE MORTGAGE.

SUPREME COURT — DELAWARE COUNTY.

JAMES K. SMITH

against

RICHARD R. JONES.

The plaintiff, complaining of the defendant, alleges and shows:

First: That on or about the day of , 19 , the defendant herein, for a good and valuable consideration, and to secure the payment of the sum of dollars, owing by the defendant to the plaintiff and payable as follows:

executed and delivered to the plaintiff a certain instrument or chattel mortgage upon the following described property

(Insert description of property.)

a copy of such mortgage being hereto annexed and made a part of this complaint.

SECOND: That said mortgage was duly filed in the office of the town clerk of the town of , wherein the defendant resided at the time of the execution and filing thereof, on the day of , 19 .

THIRD: That the plaintiff is now the owner and holder of said chattel mortgage and no part of the debt secured thereby has been paid except the sum of ; that there is now due upon said debt and upon said mortgage the sum of dollars, which sum the plaintiff has demanded of the defendant but that the defendant has failed and refused to pay the same.

WHEREFORE, the plaintiff demands judgment, for the foreclosure of said mortgage, and sale of the chattels therein described, by a proper person to be appointed by the court, and that the proceeds thereof be applied to the payment of the amount due the plaintiff and the costs of this action, and that the plaintiff have judgment against the said defendant for any costs and deficiency that cannot be satisfied out of the fund realized from the sale of said chattels, after first paying the plaintiff the amount due him and secured thereby.

(Annex verification and copy of mortgage.)

.....
Attorney for Plaintiff,
Office and P. O. Address, Etc.

No. 8.

BOND FOR SEIZURE OF CHATTEL UNDER SECTION 207 OF THE LIEN LAW.

SUPREME COURT — DELAWARE COUNTY.

JAMES K. SMITH

against

RICHARD R. JONES.

WHEREAS, the above-named James K. Smith, as plaintiff, has commenced or is about to commence, an action by summons and complaint for the foreclosure of a lien on a chattel, against the above-named defendant, and has made or is about to make, application for a warrant to seize such chattels described in the complaint, and the chattel mortgage annexed thereto, according to the provisions of the Lien Law;

Now, THEREFOR, we of , by occupation a , and , of the same place, by occupation a , do hereby jointly and severally undertake,

promise and agree to and with the said defendant, that if the defendant recovers judgment, or if the warrant is vacated, the plaintiff will pay all costs which may be awarded to said defendant, and all damages which he may sustain by reason of said warrant, not exceeding dollars.

.....
.....

Date,

(Acknowledgment, justification, and approval to be added.)

—
No. 9.

AFFIDAVIT FOR WARRANT FOR SEIZURE OF CHATTEL.
SUPREME COURT — DELAWARE COUNTY.

JAMES K. SMITH

against

RICHARD R. JONES.

STATE OF NEW YORK, } ss.:
County of Delaware.

JAMES K. SMITH, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he resides at ; that he is the owner and holder of a certain chattel mortgage made and executed by Richard R. Jones to this plaintiff, which said mortgage is dated ; and was filed in the office of the clerk of the town of ; such town being the town where the defendant, the mortgagor, resided at the time of the execution of said mortgage; that such mortgage is given to secure an indebtedness of dollars owing by the defendant to the plaintiff; that said mortgage became due and payable on the day of , 19 , and that no part thereof has been paid; that the property mentioned and described in said chattel mortgage and pledged and incumbered thereby consists of *(Describe property mortgaged.)*

That this action is brought to foreclose said chattel mortgage and the lien thereby created upon said personal property. That the above-described property is now in the possession of , at , county, N. Y., and that such possessor refuses to deliver

possession of said chattels to the plaintiff, though the plaintiff duly demanded such possession before the commencement of this action.

That said personal property and chattels are worth the sum of dollars.

That no previous application has been made in this action for a warrant to seize said property.

.....
Sworn to before me this, etc.

No. 10.

WARRANT FOR SEIZURE OF CHATTEL.

The People of the State of New York:

To the Sheriff of the County of Delaware:

WHEREAS, in an action brought in the Supreme Court of the State of New York, an application has been made to the justice granting this warrant, by James K. Smith, the plaintiff, for a warrant to seize and safely keep the chattels hereinafter described, to abide the final judgment in said action, in which said James K. Smith is plaintiff and Richard R. Jones is defendant; and it appearing to the satisfaction of the justice granting this warrant, that a cause of action such as is specified in sections 206 to 210 inclusive of the Lien Law exists in favor of the plaintiff and against the defendants to foreclose a lien for the sum of dollars, upon said chattels, and that the plaintiff is now in the possession of said chattels, and the plaintiff having given the undertaking required by law,

YOU ARE HEREBY COMMANDED to seize the following chattels, to wit.:

(Describe property.)

such chattels being the chattels and property described in the complaint in this action and in the affidavit of the plaintiff, or so much thereof as may be found within your county, and to safely keep the same to abide the final judgment in the action, and that you proceed herein in the manner and make your return within the time required of you by law.

GIVEN under the hand of one of the justices of the Supreme Court at the chambers in the of , this day of

, 19 .

.....
Justice of the Supreme Court.

.....
Plaintiff's Attorney,

Office and P. O. Address,
, N. Y.

No. 11.

ASSIGNMENT OF MORTGAGE.

This instrument, made this day of , 19 ,
between , of the of , of the first
part, and , of , of the second part;

WITNESSETH, That the part of the first part, for a good and valuable consideration to in hand paid by the part of the second part, ha sold, assigned, and transferred, and do hereby sell, assign, and transfer to the part of the second part, a certain chattel mortgage bearing date the day of , 19 , made by

And the part of the first part hereby covenant that there is due on said mortgage, the sum of

IN WITNESS WHEREOF, The part of the first part, ha hereunto set
hand and seal the day and year first above written.

STATE OF NEW YORK, }
County of , } ss.:

On this day of , in the year one thousand
nine hundred and , before me, the subscriber, personally
appeared , to me personally known to be the same
person described in and who executed the within instrument, and he
acknowledged that he executed the same.

No. 12.

SATISFACTION OF MORTGAGE.

Do HEREBY CERTIFY, That a certain chattel mortgage bearing date the
day of , one thousand nine hundred
and , made and executed by

and filed in the office of the clerk
of the , on the day of
of , in the year one thousand nine hundred and ,
at o'clock minutes M., is with the debt
thereby secured. **FULLY PAID AND SATISFIED.**

And I hereby consent that the same be discharged of record.

Dated, the _____ day of _____, 19_____
(Add acknowledgement.)

No. 13.

STATEMENT OF MORTGAGEE ON RENEWAL OF MORTGAGE.

To All Whom It May Concern:

Take notice: That, whereas, did, on
 the day of , 19 , execute and deliver to
 a certain chattel mortgage bearing date on that day
 to secure the payment of the sum of \$, payable one day
 after date, and whereas he mortgaged certain chattels and fixtures and
 other property then in the premises known as No. street,
 in the City of , a copy of which said mortgage was
 filed in the office of the Register of the County of on the
 day of , 19 , and annually refiled, the
 last renewal thereof being by notice filed in said office on the day of
 , 19 , as provided by law, and whereas there still
 remains unpaid thereon the sum of \$, with interest from
(if the mortgage has been assigned, recite the assignment to show the interest of the person who has succeeded to the interest in the property claimed under the mortgage.)

Now, therefore, I, , the mortgagee
 therein named (*or in case of assignment, as the fact may be*), do hereby
 claim an interest in said mortgaged property pursuant to the said mortgage,
 to the extent of the sum last mentioned, this statement being made and
 filed to continue the notice required by the statute made and provided for
 the renewal of chattel mortgages.

Dated, the day of , 19 .
 (Signed)

Mortgagee.

No. 14.

STATEMENT OF MORTGAGEE ON REFILING COPY OF MORTGAGE.

I, the undersigned, the mortgagee named in the mortgage, of which the
 foregoing instrument is a true copy (*or the assignee, as the case may be*),
 do hereby give notice, certify and state that there remains due and unpaid
 on the above-mentioned mortgage, and claim that there is secured thereby,
 the sum of \$, and interest from , and this
 copy and statement are filed to continue the notice required by the statute
 made and provided for the renewal of chattel mortgages.

Dated, the day of , 19 .

Mortgagee.

(File full copy of original mortgage and its endorsements at same time.)

No. 15.

NOTICE OF SALE UNDER CHATTEL MORTGAGE.

By virtue of a chattel mortgage, executed by , to
 , dated on the day of

19 , and which was duly filed in the office of the clerk of the
 of , on the day of , 19 ,
 I will expose for sale at public auction at , in the said
 of , on the day of , 19 ,
 at o'clock in the forenoon of that day, the following goods
 and chattels, to wit:

(Specify chattels.)

Dated, the day of , 19 .
 (Signed)

Mortgagee's Agent.

No. 16.

CONTRACT OF CONDITIONAL SALE.

This agreement, made this day of , 19 , between
 A. B., of the city of Albany, N. Y., party of the first part, and C. D., of
 the same place, party of the second part:

WITNESSETH, The said party of the first part has this day delivered to
 the said second party the following personal property, to wit: (Here insert
 description.) upon the terms and conditions hereinafter agreed.

The said second party agrees to receive said property and to pay said first
 party therefor the sum of dollars, in installments, as follows:
 the sum of dollars on the day of each and
 every month hereafter until the whole sum of dollars is fully
 paid.

It is expressly understood and agreed that the absolute legal title to all
 of said property is to remain in said first party until the sum of
 dollars is paid in full and the said second party shall have no title to said
 property until said sum of dollars is fully paid.

It is further agreed that in the event of the failure of said second party
 to pay any of said installments when the same shall become due, then the
 said first party may enter upon the premises and search for said property
 on the premises and in the house and buildings occupied by said second party,
 and take possession of and remove said property therefrom, with or without
 any legal process, and in such case it is also expressly agreed that said first
 party may retain all the installments previously paid, as and for com-
 pensation for the use of said property by said second party.

No verbal contract or agreement contrary to any of the terms and conditions of the foregoing contract has been made. This contract is executed in duplicate, and each party has one.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands
the day and year first above written.

STATE OF NEW YORK, }
City and County of } ss.:
.....

No. 17.

CONTRACT OF CONDITIONAL SALE IN THE FORM OF A LEASE.

THIS INDENTURE WITNESSETH, That I have this day leased and received of , the personal property hereinafter described, which is valued at dollars, and it and every part thereof is in good order and condition. For the use of said personal property, I this day pay the sum of dollars, and I do hereby agree to pay rent therefor hereafter, at the rate of dollars per month, and I agree to make such monthly payments to said on the day of each and every month hereafter, with the understanding that when I shall have fully and promptly paid rent for said property amounting to the sum of dollars, the said personal property, and every part thereof, shall become and be my property, and the absolute legal title thereto shall then, and not until then, vest in me; but in case of default in any of the payments agreed to be made as aforesaid, I hereby agree to return all of said property to said ; and in such case the said shall have full power, and I do hereby authorize the said , or his agent or agents, to enter upon my premises and to search for the said property thereon, and in and through the house and buildings occupied by me, and to remove said property therefrom with or without process of law, and to forfeit all money paid thereon; and I do hereby agree that such money paid shall be retained by said as and for the rental value of such property while occupied by me, and up to the time of such default and removal of said property from my premises.

And I further agree not to remove the said property, or any part thereof, from the premises named below as my residence, without the written permission of the said _____, I have read this contract and understand its terms and conditions, and I have made no verbal agreement or contract contrary to any of the terms and conditions as expressed in the foregoing instrument. The following is a description of the personal property leased as aforesaid: (*Here insert description.*)

This contract is executed in duplicate; and each party has one.

IN WITNESS WHEREOF, I have hereunto set my hand this _____ day of _____, one thousand nine hundred and _____.

Residence, No. _____ Street, City of _____
Occupation, _____.

STATE OF NEW YORK, }
City and County of } ss.:
.....

On this _____ day of _____, 19_____, before me, the subscriber, personally appeared _____, to me personally known to be the same person described in and who executed the foregoing instrument, and he duly acknowledged that he executed the same.

.....
.....

No. 18.

NOTICE OF SALE BY CONDITIONAL VENDOR RETAKING PROPERTY,

To _____ and all others concerned:

YOU WILL PLEASE TAKE NOTICE, that on the _____ day of _____, at the _____ in the _____ of _____, county, N. Y., at _____ o'clock in the _____ noon, unless the amounts hereinafter specified are sooner paid, (*Here insert description of the property.*) purchased by _____, of _____, under a contract of conditional sale in terms as follows:

(*Set out the contract in full or fully state its terms.*)
will be sold at public auction to the highest bidder.

That there is now due and unpaid upon said contract the sum of dollars and that the expences of the storage of said property amount to dollars,

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